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THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE IN MADRAS.

We have seen the reports of the administration of civil and criminal justice and the orders of Government thereon. The publication of these reports is always a matter of interest, and the review of judicial statistics by the Government and by the public is the necessary epilogue to the tale of judicial administration. The most prominent features of the year's administration lie in the increased popularity of Village Courts and Village Magistrates, the increasing proofs of the undoubted efficiency of District Munsifs and the signs of decadence that are visible in the higher branches of the judicial service. The number of Village Courts rose from 3,091 to 4,371 and the number of suits instituted in them rose from 70,136 to 85,584 during the year under review. The number of Village Magistrates similarly rose from 5,631 to 6,333, and the number of institutions in those courts from 10,839 to 11,802. As regards the constitution of the Village Courts it appears, the change contemplated by the Village Courts' Act, I of 1889, by the constitution of Bench Courts, appears to have been effected in parts of ten districts. There is no return published as to the number of such courts, the amount of business done by them, and the degree of popularity which they have succeeded in acquiring. We would suggest that some Honorable Member might put a question in the Legislative Council to elicit information on the subject. The District Munsifs come in for the usual *quantum* of praise by the High Court and by the Government. The Government observe, "As observed by the Honorable Judges, the amount of work done by District Munsifs on both sides of their courts was the largest on record. Notwithstanding the advance in institutions and in the number of cases which were contested, they disposed of more cases than were received during the year, and thus

greatly reduced the arrears. A larger number of contested suits was decided and fewer small causes were pending for more than three months." We hope that the steady good work which this class of judicial officers has been turning out year after year will induce the High Court and the Government to regard with favor the application made on their behalf to extend the long vacation from six weeks to two months as in the case of the higher judicial officers and their ministerial establishments. The work of the Revenue Courts does not appear to be altogether satisfactory, and, if in consequence of the Rent Recovery Bill, any portion of their work will be indirectly transferred to the Regular Courts, the change will only be welcome to the public. The number of suits disposed of by them was less than in the preceding year, and in consequence the arrears increased by about 70 per cent. Only 34 per cent. of the decisions of these courts appealed against were confirmed, the proportion being smaller than in previous years, while, on the other hand, the percentage of the decisions of District Munsifs confirmed was 64·02. We cannot help repeating the remarks that have been made by us in previous years, that, although our Subordinate Judges are as a class superior to our District Judges, there is yet very considerable room for improvement in the quality of the material which goes to make them. We cannot resist the conviction that appointments from the Bar direct to some of the places will induce greater emulation in that body, and thus increase the efficiency of the whole service. As matters stand at present, it is difficult to find men in their ranks who can be confidently recommended to fill the highest judicial offices available in the country.

Coming to the High Court, there are several matters of interest to engage our attention. The number of appeals from the decisions of a single judge on the Original Side rose from 54 in 1895 to 83, though it must be admitted at the same time that the number of appealable decrees passed rose from 173 to 272. The proportion, then, of appeals to appealable decrees is about 30 per cent., a larger percentage by the way than in the case of District Munsifs, the appeals from whose decrees bore a proportion of only 13·95 per cent. to the number of appealable decrees passed by them. A new method has been discovered in the High Court to reduce the number of appeals from the Original Side. Evidence is taken down by the judge himself in his own hand, and when such

evidence forms part of the judge's notes, copies have been refused to the parties aggrieved by the decision of the judge. In the absence of the oral evidence, it will be impossible in many a case for the appellant to satisfy the appellate court that the original judge was wrong in the conclusion arrived at from the evidence. If this course is persisted in; and no other method is devised for taking down the evidence in court, there must be a considerable falling off in the number of appeals preferred hereafter. The quantity of work done on the Appellate Side was less than in previous years, although on the Original Side it was largely in excess. The number of appeals and second appeals preferred in the High Court has fallen below the figures of the two previous years, and the number of revision petitions is also found considerably below the figures in 1895. The number preferred in 1896 was 529 as against 947 in 1895.

As regards the criminal work done by the High Court, we find the following paragraph in the report :—

"The percentage of appeals to appealable sentences of Sessions Judges was 73·3, or 7·9 per cent. less than in the previous year; the percentage of confirmation was 81·5, or 6·7 per cent. above the figures in 1895." Again, we find it stated in paragraph 58 when speaking of revision cases: "In 66·72 per cent. of the total number of cases decided as against 59·5 per cent. in 1895, the proceedings of the courts below were not interfered with. In 58 per cent. of the cases reported by Sessions Judges and 70 per cent. of those reported by District Magistrates as against 65 and 71 per cent. respectively in the previous year, the proceedings were quashed or otherwise modified. In 7·5 per cent. as against 17 per cent. in 1895 of the cases in which parties moved the High Court, the proceedings of the lower courts were interfered with." The question is, what interpretation are we to place on these figures? The greater percentage of confirmation in all classes of cases, civil and criminal, appeals and revisions, may indicate a sudden rise throughout the whole subordinate judicial service among Munsifs and Magistrates and Judges in their judicial capacity and in the care and conscientiousness with which they disposed of the cases that came before them. Or these figures may tell another tale of an increased inability on the part of the High Court to deal with its judicial work efficiently, which necessarily results in larger confirmations and more summary

dismissals. We do not think that the public can have very great difficulty in determining which is the more probable explanation. We do not find a list appended of the mode in which the various cases that came before the High Court are disposed of, showing at what stages they came to a termination. If a return were published of the number of civil and criminal revisions disposed of without admission in the years 1896 and 1897 as compared with previous years, the large disparity in the figures that will then become apparent will require explanation. A much larger percentage of these cases is dismissed at the first stage than in the previous years, though the institutions under each head appear to be smaller. This last fact will render it difficult to seek for explanation in the supposed disposition of the public or the profession to resort to the appellate tribunal lightly.

While dealing with the administration report, we cannot fail to draw attention to the important and growing evil, namely, the practice of striking off cases, because some paper called for by the Registrar has not been produced by the appellant within the time given. The time originally given is, of course, generally extended, but in several cases, it becomes impossible for the party to comply with the requisition of the Registrar within the extended time allowed. We have before now questioned the power of the High Court to strike off such cases, but there is no disposition on the part of the Judges, or to speak more correctly, of the First Bench before which such cases are always posted, to consider the legality of the procedure, or the impropriety of requiring the party to satisfy the demands of the Registrar in respect of matters which are not provided for by the Code of Civil Procedure. We must also lodge a protest against the dismissal of cases, because a heavy bill for printing deposit is not paid within the time specified. These and other ways help no doubt to swell the disposal of work and to keep up the credit of the Judges in any comparison which may be made with their predecessors. We do not find the High Court calling the attention of the subordinate tribunals to the necessity of a careful and conscientous discharge of duties by precept and by example. It is also becoming a matter of increased difficulty to the Reporter to find a sufficient number of sound and learned judgments worthy of reporting in the Madras Series. There is a strongly growing public feeling that the administration of justice is not altogether satisfactory.

THE CRIMINAL PROCEDURE CODE AMENDMENT BILL.

We have carefully read through the Criminal Procedure Bill that is now before the Imperial Council. It is certainly high time to re-enact the Code of Criminal Procedure with the numerous modifications introduced by subsequent enactments as a consolidated Code with such further changes as commend themselves to the public at large. We cannot, however, congratulate Mr. Chalmers upon the production of the Bill before us, for we do not believe, it will add very much to his reputation. We welcome the two important modifications of the existing law in Ss. 561 to 562 of the Code. The principle of not sentencing a first offender, but setting him at liberty on his recognizance to come up for sentence whenever he breaks it in the case of certain offences is recognized in the English Law and the sections dealing with it appear to have been taken from 50 and 51 Vic., Ch. 25. See Art. 22, p. 12 of Stephen's Digest of Criminal Law. The rule of police supervision in the case of certain habitual offenders as distinguished from security to keep the peace is also an excellent provision. See 34 and 35 Vic., Ch. 112, S. 8, and Art. 11, p. 7 of Stephen's Criminal Law. No words are necessary to commend these excellent provisions, and the only wonder is that they were not enacted before now in this country.

But the Bill appears to us to make a distinctly retrograde step in certain respects. We cannot approve of the addition made to clause 8 of S. 526, of the words " unless it is of opinion that the application is made for the purpose of delay or otherwise prejudicing the course of justice." There are very few Magistrates who welcome the suggestion of an application to the High Court for transfer; and, unless the Magistrate is bound to postpone or adjourn the trial, there is very little doubt that in the majority of instances he will be of opinion that the application is made for the purpose of delay or otherwise prejudicing the course of justice. At any rate the Legislature ought to place the Magistrate above the temptation of being led to consider that the application for transfer is made only for the purpose of delay or of obstructing justice, by requiring him in all cases to grant a reasonable postponement and putting him beyond the suspicion of being actuated by considerations of personal disinclination to the transfer, however

just the application may be in the particular circumstances. The policy of the law is to protect judges, against even the suspicion of being actuated by other than considerations that are purely judicial. If the amendment is to stand, we would suggest the qualification that the Magistrate or Judge must record his reason for thinking that the application is made for the purpose of delay or otherwise prejudicing the course of justice.

Again, the statement of objects and reasons does not bring out the full scope of the amendment to S. 439, which runs as follows :— Clause 5 runs :—"Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained, and except as provided by this Code, no proceedings by way of appeal or revision shall be entertained." In the statement of objects and reasons we find it stated with reference to this clause that if the person affected has the right of appeal, he should not be allowed to move a court of revision without having previously applied for relief to the appellate Court. The language of this amendment covers cases of applications by complainants in cases of acquittal for revision, though they have no right of appeal and the Government has; and also cases of references by Sessions Judges and District Magistrates for revision by the High Court when the party has failed to prefer the appeal. The amendment may in one sense be good, as it will do away with interference with an acquittal at the instance of the complainant, but it is doubtful from the statement of objects and reasons whether that is contemplated.

An important change is effected by clause 2 of S. 257 in the trial of magisterial cases, and by the last clause of sub-section 1 of S. 256. By the latter part of clause 1 of S. 256, it is enacted that the right to recall and cross-examine any witness for the prosecution present in the court or its precincts after the accused has entered upon his defence should be limited to cases where the witness has not been previously cross-examined as to the facts constituting the charge. S. 257, cl. 2, provides that when the accused has cross-examined or had the opportunity of cross-examining any witness, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice. The result of this amendment is that, unless the witness for the prosecution has been cross-examined then and there after his examination-in-chief, it will be impossible for the

accused afterwards to cross-examine the witness. The common practice of reserving the cross-examination of a prosecution witness which the magistrate is bound to accede to, because the accused has the right of summoning a witness for cross-examination after entering on his defence, will be put a stop to. We cannot think that these changes are altogether necessary. The present practice of giving the accused the liberty of cross-examining the prosecution witnesses later or a second time, has not been shown to have been abused; nor there is any reason why it should be if the Magistrate is a competent man and able to keep the accused or his pleader within the limits assigned to him by the law.

We regret that the Legislature has accepted the interpretation placed by the majority of the Allahabad Judges on S. 161 in preference to that of the minority and the Calcutta High Court. We have elsewhere pointed out that the view of the minority was in consonance with the dictates of natural justice. See 7 M. L. J. p. 372. There does not seem to be any satisfactory reason why a statement made to a Police Officer should not be used to discredit a witness who was telling a different story at the trial.

It is provided by the addition of cl. 7 to S. 145 that proceedings under the section shall not abate by reason only of the death of any of the parties thereto. We do not understand how it is proposed to continue the proceedings. There is no procedure provided for bringing in the representative or for determining which of several contending claimants is the representative. Nor would it be fair to pass an order with only one of the parties before the court, without the other party having an opportunity of adducing evidence.

Cl. 8 of S. 88 provides for an adjudication of conflicting claims to property attached by a magistrate where there has been default of a witness to appear after proclamation in the manner provided by S. 278 of the Code of Civil Procedure. The enquiry under S. 278 is not confined to the mere question of possession. Cl. 8 of S. 88 proposes to limit it to the question of possession which does not seem to us to be altogether a proper course.

There are certain amendments to which we may also make reference, as setting at rest certain doubts and difficulties felt by

the different High Courts, or as making some useful additions for the better carrying out of the provisions of the Code. Cl. 3 of S. 102 makes provision for personal search.

The words "tangible immovable property" in S. 145 have been omitted and the words "land or water" substituted with an explanation that they include houses, fisheries, crops or other produce of land and the rents or profits of any such property. It may be hoped that this will do away with the difficulty that was felt in construing the words "tangible immovable property."

The definition of the word "court" in S. 195 relating to sanctions has been inserted excluding Registrars and Sub-Registrars under the Registration Act from the signification of the term. The conflict between the Madras and the Bombay High Courts as regards the legality of a criminal proceeding without the sanction of a Sub-Registrar has thus been removed. The decision of *Subrahmania Aiyar* and *Davies*, J. J., in a recent case that the abetment of offences referred to in S. 145 does not fall within the scope of that section is overruled by cl. 3 of S. 195.

Cl. 2 of S. 225 virtually enacts that an objection as to the improper joinder of charges should be taken at the earliest possible oppurtunity. We do not think that cl. 3 of S. 233, which seeks to give effect to the decision of the Allahabad High Court is happily worded. The object aimed at in rendering an accused punishable for misappropriation as shown by the net result of the account should alone be indicated in cl. 3, instead of the clause doing away with the necessity for particulars in every case of a charge for misappropriation or breach of trust.

We do not think that the illustration to S. 403 is a desirable addition. The prospect of reversal of the acquittal in respect of an offence is held in *terrorem* over the unfortunate prisoner who thinks of appealing against a conviction for another offence charged upon the same facts.

A clause has been added to S. 476 that there shall be no revision of an enquiry directed under S. 476. This is in accordance with the view of the Bombay High Court, though it has not been followed in Madras. In regard to proceedings in respect of main-

tenance, the accused person is rendered competent to give evidence on his own behalf.

Notwithstanding the numerous changes that are introduced in this Code, we regret to find that several important matters which require to be dealt with are left unnoticed. It appears to us that the law with reference to bail is in this country in a form extremely unsuited to the conditions of this country. The only proper test for refusing bail appears to us to be the chance of the prisoner absconding. In a country like England, applying that test, bail might have to be refused in many cases, by the facility for the prisoner crossing the British Channel and finding a comfortable home in any of the continental countries. With reference to the people of this country who are very much attached to their homes, and where absconding is practically impossible, there is no reasonable ground for refusing bail in most cases, unless, of course, the offence is a capital offence or one approaching it, where the temptation for the prisoner making away with himself is great. The probability of the prisoner being convicted upon the evidence which is often regarded as a test appears to us altogether indefensible. We are also told sometimes that the chance of the prisoner tampering with the prosecution evidence is to be taken into consideration. The chance of tampering is mainly through the instrumentality of the prisoner's friends and relations who are always at liberty to employ the means at their disposal for that purpose. The suggestion might, with equal force, be made against the prosecution tampering with the defence evidence. Any danger of this description may be met by a direction that the prisoner shall not go beyond a certain defined area during the time he is on bail. The rigorous enforcement of the law as it is at present which results in the refusal of bail in many a case in which the prisoner is ultimately found innocent and the consequent detention in jail for a period which in many cases works for the prisoner the forfeiture of his caste embitters the feelings of many an innocent man and undermines the loyalty of a large number of people to the Government which is regarded as responsible for such an iniquitous law. If the Government were only able to place itself in the position of the people and to realize the consequences to the unfortunate Hindu prisoner, though declared innocent at last, we have no doubt that the amend-

ment of the law of bail would be speedily undertaken. We think the matter ought to be fairly and fully represented to the authorities in order to induce them to examine the subject.

Again, S. 491 saves the provisions of the Regulations, under the authority of which the Natu Brothers have been deported. Government cannot adequately realize the consternation which the exercise of such a power has produced in this country. The exercise of arbitrary power is sweet to the possessor, but he little realizes the feelings of intense discontent which it necessarily engenders. The duty should be cast on the Government to explain its action to the High Court upon application made to the High Court for a writ of *habeas corpus*. It may be, some limitation may be engrafted so as to give the Government some discretion. But this power of arbitrary deportation can only produce one feeling, namely, of disgust in the minds of all thinking men who are not hopelessly biased. We would strongly appeal to the Government to modify the law on this subject.

The trial of Mr. Tilak in Bombay has prominently brought before the public the question of the composition of a jury trying a native offender. A European has the right of claiming a mixed jury in which the majority shall be his own countrymen. There is no reason why, in the Presidency town, a native should not be conceded the right, which he enjoys in the moffusil under S. 275.

GROUNDS OF CRIMINAL JURISDICTION.

This subject naturally divides itself into two parts—grounds of criminal jurisdiction (*a*) as between different States and (*b*) as between the several courts exercising local jurisdiction within the same State.

First, as to the former. The practice of the various States in exercising jurisdiction over offences is based upon one or more of the following theories :—

I. The theory of allegiance, that is, that a State has jurisdiction over all offences committed by its subjects in whatever part of the world. Most civilized States claim some kind of obedience to their Criminal laws from their subjects in foreign civilized lands. In

France, for instance, the French Criminal Code of 1808 gives cognizance to the French courts of 'crimes' committed abroad by French citizens. It has been held that 'crimes' do not include minor offences; and among those offences not cognizable in France, the Court of Cassation in 1855 included adultery. In 1866, a statute was adopted extending the jurisdiction to 'delicts,' provided such 'delicts' are penal in the place of their commission. Hence it is now held that adultery committed abroad by a Frenchman is punishable in France when it is punishable in the place of its commission. (Wharton, *Conflict of Laws*, p. 696, note 2.) The Code for the German Empire punishes acts of its subjects which are criminal in the country where they are committed as well as in Germany. The Italian and the Austrian Draft Codes of 1876 and 1867, respectively, are to the same effect; providing, however, that the punishment shall not, as a rule, exceed that which might have been awarded by the law of the place where the act was done. The Bavarian Code of 1861 establishes the liability of subjects without any reservation. (Holland, *Elements of Jurisprudence*, 4th edition, p. 351.) The practice in this matter of England and the United States is different. In the former, no crime by a subject in a foreign land is by the common law triable by the courts. But by statute various offences are made so triable. By 35 Hen. VIII, ch. 2, it is enacted that all offences already made or declared, or thereafter to be made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, may be tried before the Court of King's Bench by a jury of the shire in which the Court sits or by commissioners appointed for the purpose by the king in any shire. By 24 and 25 Vict., ch. 100, s. 9, murder or manslaughter committed by any subject of Her Majesty anywhere may be tried within the jurisdiction. The Foreign Enlistment Act, 33 and 34 Vict., ch. 90, creates many offences, most of which can be committed either within or without Her Majesty's dominions. It is not quite certain how far the offences created by the acts prohibiting the slave trade are locally confined to the Queen's dominions, but it seems that they apply to all parts of the world. Lastly, there are several statutes by which Governors, Lieutenant-Governors, and other civil and military officers of colonies and other British possessions abroad, may be tried in England for acts of oppression

done in the discharge or under colour of their official powers. (2, Stephen's *History of Criminal Law*, p. 14.) The Common Law of the United States of America is the same as that of England, but by statute, offences directed from abroad against the sovereignty or high prerogatives of the State, are punishable within the jurisdiction; but, as they are rendered cognizable whether committed by aliens or by subjects, the practice is more properly referable to the next succeeding head of self-protection. The claim which India makes to the obedience of its subjects to its criminal laws even when abroad is, perhaps, greater than that of any other State, France not excepted. By S. 188 of the Criminal Procedure Code, every native Indian subject of Her Majesty is liable to be tried in British India at any place where he may be found for any offence committed by him beyond the limits of British India. In *R.* v. *Elmstone*, 7 B., H. C. R., 89, *Westropp*, C. J., seriously doubted whether the Indian Legislature could make laws to bind its subjects for acts done abroad. By the Indian Councils Act, 1861, s. 22, the Legislature is empowered to make laws for "all persons, whether British or Native, Foreigners or others, and for all courts of justice whatever, and for all places and things whatever within the said dominions," and it was pointed out that, on a proper grammatical construction, the words 'within the said dominions' qualified as well 'persons' as 'things.' But now by 32 and 33 Vict., ch. 98, s. 1, the Governor-General in Council has power to make laws for all Her Majesty's Native Indian subjects, without and beyond, as well as within, British India.

II. The theory of self-protection, that is, that a State has jurisdiction over all offences, wherever and by whomsoever committed, which affect the safety of the State as a whole or that of any of its members. This is well illustrated by the practice of the Continental States of Europe. In France, foreigners are punished who, when in another country, have been guilty of offences against the safety of the French State, of counterfeiting the State seal or coin, and of forgery of paper money: but they cannot be proceeded against *par contumace*. In Belgium the law is identical; in Spain and Switzerland it is the same in principle, but differs somewhat in the list of punishable offences. Greece takes cognizance, in addition, of offences committed abroad against Greek subjects. In

Germany, the tribunals take cognizance of all acts committed abroad by foreigners which would be high treason if done by German subjects, as well as of counterfeiting coin, of forging bank notes and other State obligations, and of uttering the same. In Austria and Italy, the tribunals take cognizance as a matter of right, of crimes directed from abroad against the safety or high prerogatives of the State. In Italy, the criminal law has been in course of revision, and the proposed criminal code renders such offences punishable, if the penalty that can be inflicted amounts to imprisonment for more than five years; it also renders offences committed abroad to the prejudice of Italians cognizable, provided that they are punishable with more than three years' imprisonment. In the Netherlands, the tribunals take cognizance of offences of the same nature as those punishable by the French Code. In Sweden and Norway, proceedings may be taken against any person accused of a crime against the State, or Norwegian subjects, or foreigners on board Norwegian vessels, if the king orders the prosecution. In Russia, foreigners are punishable for taking part in plots against the existing government, the emperor, or the imperial family, and for acts directed against 'the rights of person or property of Russian subjects.' (Hall's *International Law,* 4th edn., p. 218.) In England, offences by aliens abroad directed against the State or its high prerogatives are not cognizable in the courts, unless some overt act takes place within the jurisdiction. The practice in the United States is different, for there all offences against the State and its high prerogatives, and perjury before American Consuls and forgery of consular papers, when committed abroad, by aliens or by subjects, are, by statute, made cognizable in the Courts. (Wharton, *Conflict of Laws,* pp. 702 and 712.) In India the law is the same as in England. S. 121-A of the Indian Penal Code, indeed, professes to enact that, 'whoever, whether within or without British India, 'conspires to commit any of the offences punishable by S. 121" or to do any other acts enumerated in that section (121-A) shall be punishable in India. But according to the construction adopted by *Westropp,* C. J., in *R.* v. *Elmstone,* the Indian Legislature has no power to pass laws binding upon persons outside British India, unless they are Native Indian subjects, (32 and 33 Vict., c. 98, s. 1,) or European British subjects or servants of the Government of India in allied Native Indian States, (28 Vict., c. 17, s. 1, and the Indian Councils

Act, 1861, S. 22.) In so far as that section, therefore, purports to bind any person outside British India, other than those named, it is *ultra vires* and void.

III. The territorial theory, that is, that that State has jurisdiction within whose territory the offence is committed. But these latter words are ambiguous and may mean either the State on whose soil the offender is at the time of the commission of the offence, or the State in which the crime takes effect or is intended to take effect. Hence this theory gives rise to two subordinate theories—(*a*) the subjective territorial theory which gives the jurisdiction to the State on whose soil the offender is at the time of the commission of the offence and (*b*) the objective territorial theory which gives the jurisdiction to the State within which the crime takes effect or is intended to take effect. There is much in common between the theory of self-protection and the objective territorial theory. Offences directed from abroad against a State or its high prerogatives may, by a stretch of words, be regarded as taking, or intended to take, effect within that State. And conversely, a State punishing offences taking effect in it, though the offender is abroad, may be said to act in self-protection. But the distinctive nature of the objective territorial theory is brought to light, when it comes into conflict with the subjective theory—a conflict which gives rise to several questions of great nicety and much importance, which have not been finally settled even in the jurisprudence of particular countries. A in State X shoots B in State Y. A in State X mails a letter containing false representations to B in State Y and thereby induces him to part with property in that State. A in State X mails a letter or a newspaper containing defamatory statements to B in State Y. A in State X mails a packet containing poisoned food to B in State Y, with the intent that he should partake of it and die. A in State X pollutes a stream which flows through State Y. A in State X employs a conscious or unconscious agent to commit an offence in State Y. A in State X forwards by rail a packet containing an explosive substance, with the knowledge that it will be transhipped in State Y to the carriages of a Railway Company by whose rules it is a punishable offence to send such goods without notice, although no notice is required by the rules of the Company by which it is originally forwarded. A second class of offences is where several

persons conspire together in State X to commit an offence in State Y, or where A incites or instigates B in State X to commit, say, murder in State Y, or in State X is an accessory before the fact to a murder committed in State Y. A third class is where A in State X is an accessory after the fact to an offence committed in State Y, for instance, dishonestly receives or retains in State X goods knowing them to have been stolen in State Y. In all these cases, the question arises whether State X or State Y or both can take cognizance of the offence. If the subjective territorial theory prevails, State X will take cognizance in all these cases, while if the other theory is the right one, State Y will have jurisdiction. In America, it has been, or is likely to be, held that State Y has jurisdiction in all these cases, whether or not State X has also jurisdiction. (Wharton *Conflict of Laws*, p. 717, note 1; *ib*, *Criminal Law*, 8th ed., § 278—280.) In England the law on this point is in a state of hopeless obscurity, which is inexplicable, considering the immense debt which criminal jurisprudence owes to English lawyers.

According to the English Common Law, the place where the consequence of an act took place was regarded as having jurisdiction to try the offence. In *R.* v. *Coombes,* (1 Leach, C. C., 388) where a loaded pistol was fired from the land at a distance of 100 yards, from the sea, and a man was maliciously killed in the water 100 yards from the shore, the offence was held to be within the jurisdiction of the Admiralty and not the Common Law Courts, 'for the offence is committed where the death happens and not at the place from whence the cause of death proceeds.' But neither the reasoning of the Judges nor the argument of counsel is given in the Report. In the *United States* v. *Davis,* (2 Summer, 482), the master of an American vessel, lying in the harbour of one of the Society Islands, took his gun in hand which went off killing a person on board another ship. *Story,* J., following *Coombes*' case, held that no American Court had jurisdiction to try the offender, the offence having been committed on board a foreign vessel in the jurisdiction of a foreign government. In *Forsyth's Cases and Opinions on Constitutional Law,* p. 219, a case is reported where the Law Officers of the Crown advised that the firing of a gun from a fort in Barbadoes killing a person on boardship 2 miles off was not triable in any Court of Common Law but in the Admiralty Court. In all these cases, the whole of the consequence took place in one and the same

jurisdiction. But where the consequence took place partly in one jurisdiction and partly in another, as for instance, a person received a wound in jurisdiction X and died thereof in jurisdiction Y, there was a difficulty whether X or Y could try for the offence, as the whole of the consequence could not be said to have taken place in either. So much so that in *Lacey's case*, cited in *Bingham's case*, 7 *Coke's Reports*, it was held that in such a case neither X nor Y had jurisdiction. It is now by statute provided that felonies or misdemeanours begun in one county and completed in another are triable in either (7 Geo. IV, c. 64, s. 12): And also that where a person dies on land of a wound received at sea, or on land after being poisoned at sea, or *vice versa*, the offender may be tried in any county or place in which such death, stroke or poisoning or hurt shall happen in the same manner in all respects as if such offence had been committed in that county or place. (24 and 25 Vict., ch. 100, s. 10.) But it has been held that these statutes do not confer a jurisdiction on the English Courts where part of the consequences took place outside English jurisdiction altogether and only part within. Thus in *R.* v. *Lewis*, (26 L. J. M. C., 104) where a foreigner on board a foreign ship inflicted a blow on another foreigner on the high seas, it was held that the English Courts had no jurisdiction, although the death occurred and the offender was in custody within the jurisdiction. The test was laid down to be whether the Courts would have had jurisdiction, supposing that the whole of the consequences had taken place where only part had. In *R.* v. *Keyn* (L. R., 2 Ex. D., 63) a different and, as it would appear, the true note was for the first time sounded towards the close of the judgments of *Amphlett*, J. A., and *Cockburn*, C. J.. A German steamer named, *The Franconia*, had, by the negligence of the captain, the accused Keyn, run down a British steamer called the *Strathclyde*, within the territorial waters of England, killing a woman named Young. Keyn was thereupon indicted before the Central Criminal Court for manslaughter, and convicted, but the question of law whether the English courts had jurisdiction over the offence was reserved. Two questions were involved—(1) whether the English Criminal Law extended to the territorial waters so as to bind foreigners on board foreign ships; (2) supposing the English Criminal Law did not so apply, whether the offence was committed on board the German steamer where the accused

remained, or on board the British ship where the negligence took effect and so within English jurisdiction. It is clear that if either the first question be answered in the affirmative or with respect to the second it be held that the offence was on board the British ship, the jurisdiction of the Court could be upheld. The majority of the Court (*Cockburn*, C. J., *Kelly*, C. B., *Bramwell*, J. A., *Lush* and *Field*, J. J., *Sir R. Phillimore*, and *Pollock*, B.,) held that there was no jurisdiction and therefore in the opinion of that majority the offence was not committed on board the *Strathclyde*. The minority (*Lord Coleridge*, C. J., *Brett* and *Amphlett*, J. J. A., *Grove*, *Denman*, and *Lindley*, J.J.,) upheld the conviction unanimously answering the first question in the affirmative. But with respect to the second, there was dissension among these Judges. *Denman*, J., was strongly of opinion that the offence was committed on board the British ship. He relied upon the cases of *Coombes* and *United States* v. *Davis*, as also that reported in Forsyth, for the position that the place where an offence takes effect has jurisdiction. That being so, can any difference arise, he asks, because in those cases there was intention and in this case there was none? No. Such a distinction would not only be very inconvenient but also contrary to all established principles of law. Suppose a person on board a French ship on the high seas shoots another on board an English ship, can it be borne that the former should not be triable in England but allowed to escape with impunity? *Lord Coleridge*, C. J., was also of the same opinion but not without great hesitation. *Brett*, J. A., thought that the offence was committed neither on board the *Franconia* nor on the *Strathclyde*, while *Grove* and *Lindley*, J. J., expressed no opinion on the point. On the other hand, *Amphlett*, J. A., expressed himself in words which strike the keynote of the whole matter. "Now, according to the decision in *R.* v. *Coombes*, the crime must, for the purpose of determining the venue, be held to have been committed on the English ship where the death occurred; but this doctrine founded as it is upon a convenient fiction and binding no doubt upon a British subject, does not decide the question before us, which is whether a foreigner who committed an offence while he was *de facto* outside English territory, could be made amenable to English Law. With some doubt, I have come to the conclusion that he could not. I can findno authority for saying that a State has any jurisdiction to punish a foreigner who

at the time of the commission of the offence was *not within the territory and consequently not owing it any allegiance.*" It will be seen that while the opinions of the minority of the Judges on the second question were not necessary to the decision of the case, the opinions of the majority were. Among the latter, *Cockburn*, C. J., distinguished the present case from that of *Coombes* and the others, on the ground of absence of intention. And in making such a distinction, he was supported by *Bramwell*, J. A., and *Sir R. Phillimore*. But it may be doubted whether *Denman*, J., was not more right in condemning such a distinction as leading to absurdities and being contrary to established principles of law. *Cockburn*, C. J., however, proceeded further, and, assuming that the crime was committed on board the British ship, said, and this is the most valuable part of his judgment so far as the present controversy is concerned, "The question is, and this appears to me to have been lost sight of in the argument—not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant at the time the act was done was himself within British jurisdiction. . . . . *According to the doctrine of Lord Coke in Calvin's case*, 7 *Co. Rep.*, *protection and allegiance are correlative; it is only where protection is afforded by the law that the obligation of allegiance to the law arises; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British Law extends, the subject of a foreign State owes obedience to that law or is amenable to its jurisdiction.*" Again, "the opposite view is founded on expediency, which is to prevail over principle." As to the argument put forward by *Denman*, J., that a person on board a French ship shooting another on board an English ship on the high seas, would escape with impunity, the learned Judge rightly points out that if the law of France is at all like that of England, the offender will meet with punishment in France. "I am aware," he goes on to say, "that this view is not in accordance with the decision in the American case of *Adams* v. *The People*, 1 Comst., (N. Y) 173", where it was held that a fraud committed by a citizen of the State of Ohio and residing in it, through an agent at New York, who was wholly innocent and ignorant of the fraud, could be tried in New York. But the learned Judge thought that the judgment in that case contained much loose reasoning and entirely overlooked

the turning point in it, namely, that the accused, being a foreigner and having been out of the jurisdiction when the act was done, owed no allegiance to the law of New York. *Pollock*, B., and *Field*, J., concurred in the judgment of *Cockburn*, C. J. The English case of *R.* v. *Sans Garrett* (6 Cox C. C. 260) does not seem to have been brought to his notice. The accused in that case had obtained from a banking firm in New York a circular letter of credit for £210, authorizing him to receive that sum or any portion of it from certain named correspondents in foreign countries, and then to draw upon the Union Bank in London for that amount in favour of the persons from whom he had received it. He went to St. Petersburg and having fraudulently altered the sum mentioned in the letter from £210 to £5,210, he presented it in its altered form to W. & Co., of that city, one of the firms named in the letter and obtained from them £1,200. He drew a bill for that amount on the Union Bank in favour of W. & Co., which was presented in London to the Union Bank, but the Union Bank, referring to their letter of advice, refused payment. On an indictment charging the accused with an attempt to obtain money by false pretences from the Union Bank in London, the Judges had no doubt that there was jurisdiction. Lord Campbell said 'a person may by the employment, as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our Courts.' Baron Parke said 'a person, though personally abroad, might commit a crime in England, and be afterwards punished here; as, for instance, if he, by a third party, sent poisoned food to one in England, meaning to kill him, he would be guilty of murder, if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction.' But the accused was ultimately acquitted on the ground that no offence within the meaning of the Act under which the indictment was framed, was committed. In *R.* v. *Taylor* (4 F. & F., 511), the prisoner who had obtained money for a forged cheque abroad was held subject to punishment for the offence in England, because the cheque was afterwards presented there. In *R.* v. *Munton* (1 Esp., 61) money had been misappropriated abroad; but as false accounts intended to conceal the offence had been sent to England, *Lord Kenyon* held that the offence was cognizable by the English Courts. There is no doubt that if these cases had

been brought to the notice of *Cockburn*, C. J., in *R.* v. *Keyn*, he would have expressed his dissent from them as well.

It is difficult to estimate the effect of *R.* v. *Keyn* upon the law on this point. In *Queen* v. *Holmes* (12 Q. B. D., 23) H wrote and posted at Nottingham in England a letter addressed to G at a place out of England, containing a false statement by which he fraudulently induced G to transmit to Nottingham a draft for £150 which he there cashed. It was held, following *R.* v. *Cooke* (1 F. & F., 64) and *Rex* v. *Burdett* (4 B. & H., 95), that when a letter such as the one in question is posted, the pretence is made, and that since in the present case both the letter was posted, and the money received at Nottingham, there was *à fortiori* jurisdiction to try at that place. This case thus renders bad law so much of the cases of *R.* v. *Coombes*, *The United States* v. *Davis*, and that reported in Forsyth as laid down that the place where the offender is at the time of the commission of the offence has no jurisdiction to try for it. The rest of those cases also has, it is submitted, been rendered bad law by the decision of the four Judges (*Cockburn*, C. J., *Pollock*, B., *Field*, J., and *Amphlett*, J. A.,). in *R.* v. *Keyn*. Sir James Stephen is of a different opinion. "Upon the whole", he says "four (?) of the Judges who decided the case of *R.* v. *Keyn* seem to have been of opinion that a crime committed by an act which extends over more jurisdictions than one in space is committed in the jurisdiction in which it takes effect, whether or not it is also committed in the jurisdiction in which it begins to be done. In accordance with this view, Baron Pollock and I lately held that a man who obtained goods from a merchant in Prussia by false pretences contained in a letter sent from Amsterdam, where he lived when he wrote the letter, obtained them in Prussia, and we refused a *habeas corpus* to prevent his extradition accordingly." (2 H. C. L., 11).

As to an extra-territorial abetment of an intra-territorial crime, the abettor would not be liable to the English jurisdiction, as, by the Common Law, an accessory could be tried only where the act of abetment occurred (2 H. Bl., 163, 2 East, 775, Bulwer's case, 7 Rep., Thomas and Fraser's edition, Vol. IV, 52, 53.) The converse question arose in the case of *Reg.* v. *Bernard* (1 F. & F., 240) which at the time attracted much attention. Bernard was accused

of having been an accessory before the fact in England to a murder committed by Orsini and others in France by throwing a shell with intent to kill the Emperor of France, but which actually killed some others. The question was reserved whether any offence had been committed of which the law of England would take notice. But as a verdict of not guilty was returned, it did not become necessary to decide the question. In *R.* v. *Kohn* (4.F. & F., 68) the accused, a foreigner, was charged with having conspired at Ramsgate to destroy a foreign ship, which was consequently destroyed on the high seas. *Willes*, J., in charging the jury asked them to find whether the prisoner was a party to a conspiracy to destroy the ship not limited to a destruction on the high seas; for, if it was contemplated that the ship might be destroyed off the bar at Ramsgate, then the English Court had jurisdiction. According to this case, therefore, an intra-territorial abetment of an extra-territorial crime is not punishable in England. Sir James Stephen is also of the same opinion, as, according to him, the English Law takes no notice of crimes committed abroad, but thinks that conspiracies might stand on a different footing. But Roscoe (Crim. Evidence, p. 240) commenting upon the case of *R.* v. *Kohn*, thinks that upon principle a conspiracy in England to commit a crime abroad ought to be criminal, for a conspiracy may be a crime, although the act proposed to be done is not in itself a crime, and thus a conspiracy between foreigners in England to injure a foreigner out of the jurisdiction might be a crime against the law of England, though the injury itself might not be under the jurisdiction of English Law and in that sense not criminal. In the case of murder, it has been, by statute 24 and 25 Vict., ch. 100, s. 4, enacted, that all intra-territorial abetments, incitements, conspiracies, etc., to commit that offence in respect of any person, whether he be within the Queen's dominions or not, shall be cognizable in the Courts.

The same principles would apply to accessories after the fact. A person in France dishonestly receiving goods stolen in England would not be triable in England, as, according to the English Common Law, accessories are to be tried in the respective places where their guilty acts take place. Conversely, a person could not be convicted in England of receiving goods stolen in Guernsey

(*R.* v. *Debruiel,* 11 Cox, 207). In *R.* v. *Carr,* 10 Q. B. D., 76; the prisoners were indicted before the Central Criminal Court in England for having feloniously received in England certain valuable securities which were stolen from a British ocean-going merchant ship, whilst she was lying afloat in the river at Rotterdam in Holland, moored to the quay. It did not appear who the thief was. It was held by Lord *Coleridge,* C. J.; *Pollock,* B.; *Lopes, Stephen* and *Watkin Williams,* JJ., that there was jurisdiction over the prisoners, inasmuch as the principal offence was within the Admiralty jurisdiction of England, thus clearly implying that where the principal offence was not triable in England, neither would the accessory be. The exclusion of jurisdiction over intra-territorial accessories, whether before or after the fact, to extra-territorial crimes, is not a little due to the fiction that the accessory follows the principal.

In India, it is satisfactory to note that one principle has pretty uniformly been followed, and that principle the one which must ultimately be regarded as the sound one. S. 2 of the Penal Code enacts that every person shall be punished according to the Code for every act or omission of which he shall be guilty within the British Indian territories. Take the case, for instance, of a person in British India shooting and killing another across the border. Murder is defined as doing an act with the intention of causing death. In this case the act which causes the death is pulling the trigger, and this is an act of which the person is guilty within British India. And it will be admitted that death is death, whether it takes place on this or that side of the border. So the person would be liable to British Indian jurisdiction. On the other hand, a person on the other side of our border shooting and killing another on this side would not be guilty of the act of causing the death, namely, pulling the trigger, within British India, and therefore would not be liable to British Indian jurisdiction. Similar remarks apply to the cases of defamation, cheating, criminal intimidation, etc., which are capable of being committed in more jurisdictions than one.

An extra-territorial abetment of an intra-territorial crime is not punishable in the Indian Courts. This was decided in *Reg.* v. *Pirtai,* 10 B., H. C., 356, where the conviction at Satara of a

person, a subject of the Kolhapur State, who in that State instigated a murder which was committed in Satara, was annulled by the High Court. But an intra-territorial abetment of an extra-territorial crime is, it would appear, cognizable, on general principles, in the Indian Courts. "It may be that the Indian Legislature had power so to legislate as to an abetment in India of an offence committed out of India, and may not have had power to legislate for the principal offence itself if committed beyond British Indian territory." Per *Westropp*, C. J., in *R.* v. *Elmstone.* Thus, S. 121 of the Penal Code penalises the abetment of waging war against the Queen, and illustration (*b*) shows that the principal offence may be in Ceylon, beyond British Indian territory. Similarly S. 125 penalises the abetment of the waging of war against an allied Asiatic State, although the principal offence itself will in the majority of cases take place outside British India; S. 236, again, penalises the abetment in British India of the counterfeiting of coin outside British India. Apart from these isolated instances, S. 109 of the Code provides for the abetment of offences in general. 'Offence' is defined in S. 40 of the Code as anything made punishable by that Code. The interpretation put upon this definition by *Westropp*, C. J., in *R.* v. *Elmstone*, is that it refers only to those acts or omissions which are made punishable, not merely by virtue of their quality, considered abstractedly from time, place and person, but by virtue as well of their place and time and the capacity of the person guilty of them, as of their quality. This narrow construction was also adopted in *R.* v. *Moorgy Chetty*, I. L. R., 5 B., 338, notwithstanding the vigorous protest of *West, J.*, and has received the indirect sanction of the Legislature. As the Penal Code, therefore, stands at present, there cannot, except in the special cases referred to, be an intra-territorial abetment of an extra-territorial crime, for the latter is not an 'offence.' (*Queen-Empress* v. *Ganpatrao Ramchendra*, I. L. R., 19 B., 105.)

Persons outside British India dishonestly receiving goods stolen in British India have committed no offence cognizable by British Indian Courts (*R.* v. *Kirpal Singh*, I. L. R., 9 A., 523.) Conversely, persons receiving or retaining in British India goods stolen abroad, would, on general principles, be guilty of an offence in British India. The contrary decision in *R.* v. *Moorgy Chetty*, proceeded in the main upon the construction of S. 410 of the Code. 'Stolen property'

was defined in that section as 'property the possession whereof has been transferred by theft, extortion or robbery, or which has been criminally misappropriated, or with respect to which criminal breach of trust has been committed.' It was argued by *Garth* and *Melville*, J.J., that the words 'theft,' etc., meant the offences of theft, etc.; that 'offence' meant anything punishable by the Code, both by virtue of its quality and by virtue of its time and place and the capacity of the person doing it; that theft, etc., committed outside British India were not 'offences' and the property obtained thereby not 'stolen property;' and that therefore there could be no dishonest receipt or retention of the same within the meaning of the Code. *Garth*, J., thought that the same result would also follow from general considerations. *West*, J., on the other hand in an able and learned judgment, arrived at a contrary conclusion, both upon general considerations and upon a construction of the Code. He was of opinion that the narrow construction put upon the word 'offence' in the Code was untenable, and that it referred to all acts of a nature made punishable by the Code, considered abstractedly from time, place and person. To remedy the inconvenience arising from the construction of S. 410 of the Code which prevailed on this occasion, the Legislature by Act VIII of 1882, S. 9, enacted that property may be stolen property, whether the theft, etc., was committed within or without British India. Of a more general character is the legislation of Act III of 1894, whereby sections 176, 177, 201, 202 and 212 of the Penal Code have been amended so as to include certain cases in which the principal offence was committed outside British India. The new section 216-A, introduced by that Act, imposing a penalty for harbouring robbers or dacoits, has an explanation to the effect that it is immaterial whether the robbery or dacoity is intended to be or has been committed within or without British India.

It is to be borne in mind that the provisions of the Code of Criminal Procedure, sections 179 to 184, giving jurisdiction to more courts than one in respect of the same offence, do not operate to confer a jurisdiction on our courts which no such court would have had without them but only to regulate the exercise of jurisdiction among them when there would have been jurisdiction independently of them. (*R.* v. *Pirtai*, 10 B., H. C., 356; *R.* v. *Adivigadu*, I. L. R.,

1 M., 171; *R.* v. *Bapu Daldi, ib.*, 5 M., 23; and *Nga Hoong* v. *The Queen*, 7 M., I. A., 72.)

IV. Lastly, the theory of 'general supervision' or of 'cosmopolitan justice,' as Professor Holland terms it, that is, that all States are equally interested in putting down crime wherever committed, and therefore that each State has jurisdiction over offences, wherever committed, if the offender be arrested within the territorial limits. In Austria and Italy we have seen that the tribunals take cognizance as a matter of right of offences directed from abroad, against the sovereignty or high prerogatives of the State. In Austria, other crimes are also taken cognizance of, provided an offer of surrender of the accused person has been made to the State within which the crime was committed, and has been refused by it. Italian law is also the same, with the exception that proceedings can be taken, without previous offer of surrender, when the crime has been committed within three miles of the frontier, or when stolen property has been brought into the kingdom. By the draft Italian Criminal Code, provision is made for proceeding against foreigners for certain offences committed by them abroad, directed against foreigners, provided that extradition shall have been offered to, and refused by, the Government of the State within which the act is done. In the Netherlands, foreigners can be proceeded against for murder, arson, burglary, and forgery of bills of exchange committed them abroad. (Hall, *International Law*, 4th Edn., 218.) In England and the United States this doctrine finds no illustrations whatever, and in India the law is the same, unless, indeed, the provisions of S. 1 of the Slave Trade Act, 39 and 40 Vict., c. 46, rendering the subjects of Asiatic States in alliance with Her Majesty, liable in common with subjects of Her Majesty, to be tried in British India, for any offence under the sections relating to slavery in the Penal Code, of which they may be guilty in any part of Asia or Africa, of S. 188 of the Criminal Procedure Code, rendering European British subjects liable to be tried in British India for offences committed by them in Native Indian States in alliance with Her Majesty, and of S. 4 of the Penal Code providing that servants of the Government of India shall be liable to be tried according to the Code for acts or omissions of which they shall be guilty within such States, be regarded

as furnishing exceptions. With respect to the last of these exceptions, it is to be observed that in so far as the section relates to servants of the Government of India who are European British or Native Indian subjects, it is merged in S. 188 of the Criminal Procedure Code, and in so far as it relates to servants who are not such subjects, it is practically useless, inasmuch as it has been held in *Empress* v. *Natwarai*, I. L. R., 16 B., 178, that, there being no provision similar to S. 188 of the Criminal Procedure, giving to any court local jurisdiction over offences by them, there is no court empowered to try such offences, although theoretically they may be triable in British India.

I shall next proceed to discuss the above theories and to examine how they fit in with the practice of nations in regard to the exercise of jurisdiction on the high seas and in barbarous and semi-barbarous lands.

M. A. TIRUNARAYANACHARI.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER IX.

On Partition of Stridhana.

On this subject Manu says: "But when the mother is dead, all the uterine brothers and uterine sisters shall equally divide their mother's wealth."(1) *Commentary*—'Equally' means 'without allowing any additional share to the eldest, etc.' Sisters unmarried and unprovided for are here contemplated agreeably to the text of Brihaspati which follows. '*Sanabhayah*' means 'born of the same womb.'

Accordingly, Manu says: "To the daughters of these sisters also, something in due proportion should with affection be given out of their grandmother's wealth.'(2) *Commentary*—'*Their's* stands for 'sister's.' '*Yathamsutah*' means 'according as the wealth is large or small.'

Again Manu says: "Her *anvadheya* property, as well as any wealth given her by her husband from affection, shall go to her

(1) Manu, Chap. IX, 192. (2) Manu, Chap. IX, 193.

issue if she die in the lifetime of her husband."(1) *Commentary*—'*Anvadheya*' will be subsequently defined. Halāyudha says that this text is intended to negative the right of the husband in these two kinds of property. So even where the wife dies during the lifetime of her husband.

Brihaspati says: "*Stridhana* goes to the issue, and the daughter if unmarried, shares in it. But if she is married, she receives some honorary trifle only."(2) *Commentary*—'Issue' means 'sons.' 'Shares in it' means 'shares equally with the sons.' '*Apratta*' means 'unmarried.' In the light of this text it must be understood that the text of Manu lays down that *only* unmarried daughters share equally with the brothers. As to the married, something, from a sense of fairness, should be given.

Gautama says: "A woman's property goes to her daughters, unmarried and unprovided for."(3) *Commentary*—This is not intended to negative the right of sons to share but to establish the right of daughters to share. 'Daughters unprovided for' means 'married daughters, childless, having an indigent husband or unfortunate otherwise.'

Manu says: "The *yautaka* property of the mother goes to the daughter alone."(4) *Commentary*—"*Yautaka*' here means 'wealth given to a woman at the time of her marriage by her father and the rest.' Halayudha, however, says, that '*yautaka*' means 'money given to a woman for sundries and improved by her by her own skill,' and that brothers and married daughters shall not divide it, but that the childless, the unfortunate and the unmarried daughters should share it equally.'

Vasishtha says: "Let daughters share the nuptial presents of their mother."(5) *Commentary*—Nuptial presents, *i.e.*, apparel, mirror, bracelets, etc.

Yājnavalkya says: "Daughters shall take the wealth of their mothers deducting debts due; and in default of them, their issue."(6) *Commentary*—'Debts', *i.e.*, 'debts due by the mother.' The meaning in effect, therefore, is that the daughters unmarried

(1) Manu, Chap. IX, 195. (2) Brihaspati, Chap. XXV, 87.
(3) Gautama, Chap. XXVIII, 24. (4) Cole. Dig., Vol. II, 605, CCCCXCI.
(5) Vasishtha, Chap. XVII, 46. (6) Yajnavalkya, Chap. II, 117.

and unprovided for shall divide the *yautaka* and the nuptial present of their mother left after discharging debts due by her. In default of daughters, their issue, daughter's son, etc. This text applies where the marriage has been in the Bramha and other approved forms.

Vishnu says: "Where a woman dies leaving children, her wealth in all cases goes to her daughter."(1)

Manu says: "The wealth of a woman given to her by her father on any account, her Brahminee daughter shall take; or it may go to that daughter's issue."(2) *Commentary*—Where she has neither husband nor issue of her own, and where there are co-wives of different castes and daughters by them, then the Brahminee daughter takes the wealth of her mother's co-wife given by the latter's father. This is the meaning. Prakāsakāra says, that according to Medhatithi the expression, 'given by her father' is illustrative of all cases of *stridhana*.

Kātyāyana says: "In default of daughters, her wealth goes to her sons. But what she received from her kinsmen goes to her husband in default of her kinsmen. Married sisters shall share with kinsmen. Thus, legal partition of *stridhana* property is ordained."(3) *Commentary*—Wealth received at the time of marriage, *yautaka*, and wealth given by her father go to the sons in default of daughters. To other kinds of *stridhana*, persons previously named are heirs. In default of those previously named, it certainly goes to her husband.

Here ends the chapter on 'Partition of *Stridhana*.'

CHAPTER X.

On Partition of Stridhana of a woman, married according to the various forms of marriage dying without issue.

On this subject, Narada says: "The *stridhana* of a woman goes to her issue. If she dies childless, it is declared to go to her husband where she has been married in the Brahma or in one of the four forms mentioned after it. If married in one of the other

(1) Vishnu, Chap. XVII, 21. (2) Manu, Chap. IX, 198.
(3) Cole. Dig., 607, CCCCXCIII.

forms, it goes to her parents."(1) *Commentary*—The word 'four' in the text is not intended to exclude the fifth. Therefore, if married in the *Brāhma, Daiva, Ārsha, Gāndharva,* or *Prajāpatya* forms, the wealth of a childless woman goes to her husband; if in any other, *i.e.,* the *Rākshasa,* the *Āsura* or *Paisacha* form, it goes to her parents. This rule applies to *stridhana* received at the time of marriage.

Accordingly, Manu also says: "It is ruled that the property of a woman married in the *Brāhma,* the *Daiva,* the *Ārsha,* the *Gāndharva,* or the *Prājapatya* form goes to her husband alone if she die without issue. But the wealth given to her at her marriage in the *Āsura* or other forms, goes to her parents if she die without issue."(2) *Commentary*— '*Aprajasi*' means 'childless.'

Devala says: "On the death of a woman, her *stridhana* goes to her sons and unmarried daughters. If she dies childless, her husband, mother, brother or even father takes it."(3) *Commentary*—Her husband takes it, if married in the *Brāhma* and other forms; her mother in the *Āsura* and other forms. It must, therefore, be understood that the texts of Manu and Narada are interpreted consistently with what Devala has said.

Gautama says: "The *sulka* of the sister goes to her uterine brothers after the mother is dead. But some hold that it goes to them even before her death."(4) *Commentary*—The wealth received by the sister in the *Āsura* and other forms of marriage goes to her uterine brothers when the mother is dead. The particle '*cha*' means 'even.' Therefore it means—that the same rule applies to the sister's *sulka* even though the mother lives. Some read 'uterine sisters' for sisters.' Halāyudha observes that this is the view of some others.

Yājnavalkya says: "If a woman die without issue, her kinsmen take the wealth given her by her kinsmen, her *sulka* and what she had received after marriage."(5) *Commentary*—Here *sulka*

(1) Narada, Chap. XIII, 9.

(2) Manu, Chap. IX, 196 and 197.

(3) Cole. Dig., Vol. II, 603, CCCCLXXXIX.

(4) Gautama, Chap. XXVIII, 25 and 26.

(5) Yajnavalkya, Chap. II, 144.

means 'the price for which a girl is given.' '*Anvadheya*' is indicative of *stridhana*. Kinsmen by her mother. This text also applies to cases of marriage in the *Āsura* and other forms.

Manu says: "If an appointed daughter die sonless by accident, her husband shall take her wealth without hesitation."(1) *Commentary*—This rule must be understood to apply where the sonless appointed daughter leaves neither daughter nor sister.

Paithinisi also says: "When an appointed daughter dies sonless, her husband shall not take her wealth. It shall be taken by her daughter or by her sister." *Commentary*—Here it must be noted that the sister takes it in default of the daughter.

Yājnavalkya says: "He who having given a maiden withholds her (from her husband) is punishable and shall pay the husband's expenses with interest. But if she die, he shall pay everything, making allowances for expenses on both the sides."(2) *Commentary*—He who having promised by word of mouth to give a maiden withholds her without fault (on the part of the bridegroom) should be punished by the king and made to pay the bridegroom his expenses with interest. But withholding for proper reasons is no blame; for the same author says: "He may withhold from the bridegroom a maiden betrothed, if a better bridegroom is subsequently available."(3) *Commentary*—But if the maiden dies by accident, then he shall calculate what had been given by the father to honour the bridegroom's party previously and what had been given by the bridegroom's party such as finger-rings, etc., and pay the balance.

Sankha says: "The bridegroom shall receive back the *sulka*."(4)

Baudhayana says: "The wealth of a deceased maiden, the uterine brothers shall take. In default of them, it goes to the mother, and in default of her, to the father."(5) *Commentary*—'Maiden' means 'an unmarried daughter.'

Brihaspati says: "The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law

(1) Manu, Chap. IX, 135. (2) Yājnavalkya, Chap. II, 146.
(3) Yājnavalkya, Chap. I, 65. (4) Cole. Dig., Vol. II, 619, DX.
(5) Cole. Dig., Vol. II, 618, DVII.

and the elder brother's wife are declared equal to the mother. When these have no sons, *aurasa* or otherwise, or daughter's sons or the sons of the latter, their sister's son and the rest shall take their wealth."(1) *Commentary*—The meaning is that in default of the *aurasa* son, etc., of the mother's sister, etc., the sister's son, etc., takes the wealth of the deceased.

Here ends the chapter on 'Partition of *Stridhana* under the various forms of marriage.'

CHAPTER XI.

On the Nature of Stridhana.

On this subject, Manu and Kātyāyanā say: "*Stridhana* is declared to be of six kinds; wealth given before the fire, wealth given at the time of going to the husband's house, wealth given out of affection and wealth received from the mother, brother and father."(2) *Commentary*—'Given before the fire' means 'given at the time of marriage by any body whatever.' '*Adhyāvahanika*' means 'what is taken by the bride when she leaves for the husband's home.' Medhatithi says that *Adhyāvahanika* is wealth given by the father-in-law and the rest when the woman is taken from her husband's house to her father's. That meaning is also acceptable; for, the same reason applies. 'Given out of affection' means 'given by the father-in-law, etc., being pleased by her good disposition, virtuous conduct and skill.' The number 'six' is intended to show that there are no fewer, not that there are not more; for Yājnavalkya recognizes one more kind of *stridhana* called '*Adhivedhanika*.'

Yājnavalkya also says: "What is given by the father, the mother, the husband and the brother, what is received before the nuptial fire and *Adhivedhanika* are declared to be the peculiar property of women."(3)

The same author defines *Adhivedkanika* thus: "An equal share should be given as *Adhivedhanika* to the superseded wife where no *stridhana* had been given to her. If given, a half of that

(1) Cole. Dig., Vol. II, 621, DVIII. (2) Manu, Chap. IX, 194.
(3) Yājnavalkya, Chap. II, 148.

is declared."(1) *Commentary*—She is said to be superseded when her husband marries another. Again Vishnu recognizes another kind of *stridhana* called *Anvadheya.*

He says: "What is given by the father, the mother, friends and brothers, what is received before the nuptial fire, what is paid for supersession *Anvadheyakam* and *sulka* are the different kinds of *stridhana.*"(2)

Narada says: "What is given before the nuptial fire, what is given when the wife leaves for the husband's house, what is given by the husband; likewise what is given by the brother and the parents are declared to be the six kinds of *stridhana.*"(3) *Commentary*—Here also it is not meant that there are no more than six kinds.

Devala says: "What is given for food and raiment, jewellery, *sulka* and wealth otherwise received are *stridhanam.*"(4)

Kātyāyana says. "Over wealth acquired by a woman by arts or given her out of friendship by others, her husband has ownership always. The rest is her own absolute property."(5) *Commentary*—The meaning is that the husband alone is the owner of wealth acquired by his wife otherwise than in the manner previously mentioned.

The same author says: "What is given to women at the time of marriage before the sacred fire; this is declared by good men to be their *stridhana* called '*Adhyāgnikrita,*' (given before the nuptial fire). What a woman receives while being taken from her father's house is declared her property called '*Adhyāvahaikam*' (given at her procession)."(6) *Commentary*—This is the *Adhyavahanika* as defined by Kātyāyana.

The same author says: "What is given to a woman by her mother-in-law or her father-in-law from affection and what is given her in return for her humbly prostrating herself (before elders) is

(1) Yājnavālkya, Chap. II, 148.
(2) Vishnu, Chap. XVII, 18.
(3) Narada, Chap. XVII, 8.
(4) Cole. Dig., Vol. II, 597, CCCCLXXVIII.
(5) Cole. Dig., Vol. II, 589, CCCCLXX.
(6) Cole. Dig., Vol. II, 585, CCCCLXIV and V.

called '*Lāvanyārjitham*' (wealth gained by loveliness). What is received by a woman after her marriage from her husband's family or from the family of her parents is called *Anvadheya* (gift subsequent). But Bhrigu gives the name of *Anvadheya* to wealth received by a woman after her nuptials from her husband or from her parents from affection. What is received by a woman as a reward for her managing and looking after the household utensils, beasts of burden, milch cattle, ornaments, and servants is called *sulka* (perquisite)."(1) *Commentary*—The meaning is 'what is given to a woman as gratification for her doing her duty well in respect of the household and the rest is called '*sulka*.' '*Saudhayika*' has been already explained in some previous context and is therefore not mentioned in this chapter.

Here ends the chapter on the 'Nature of *Stridhanam*.'

CHAPTER XII.

On Partition of Effects concealed.

On this subject, Manu says: "When, after all debts and wealth have been divided according to law, any other property is discovered, it shall be similarly divided."(2)

Yājnavalkya says: "When property is found to have been secreted by one or more co-heirs, they shall divide it again in equal shares. This is settled law."(3) *Commentary*—Seeing that, under the circumstances, a subsequent division naturally follows, Halāyudha says, that the injunction by means of this text indicates that the secreting of common property by one does not constitute the offence of theft.

Kātyāyana says:—" Let sons recover property secreted by one of them and divide it equally after the father's death. Property which the co-heirs have secreted from each other, or which has not been properly divided, let them on discovery thereof divide it equally. So says Bhrigu. Property acquired by one of the co-heirs after the partition belongs to him alone. But he must

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(1) Cole. Dig., Vol. II, 586, CCCCLXVI and 587, CCCCLXVIII, 1—3.

(2) Manu, Chap. IX, 218.

(3) Yājnavalkya, II, Chap. II, 126.

divide with the rest property recovered by him after it had been stolen or lost and property above described. Property which a relative had secreted, he should not be compelled by violence to restore; nor shall one of many undivided co-heirs be compelled to make good what he had expended."(1) *Commentary*—'Stolen,' *i.e.*, by others. 'Lost' means 'missing.' 'Property above described' means 'paternal grandfather's wealth.' 'Should not be compelled by violence to restore' means 'should be recovered from him by use of wiles.' 'Should not be compelled to make good what he had expended' means 'should not, at the time of partition, be made to pay money expended, on the ground that he had benefited by it more than the rest.'

Brihaspati says: "If a debt or bailment common to all be fraudulently concealed by one, he shall be made to restore it, not by use of violence, but by the use of dodges calculated to deprive the defrauder of his property. Men given to pretending, covetous, wily and avaricious should be subdued by conciliatory methods, either by the loss of their own wealth or by wiles."(2) *Commentary*—When a common debt or bailment is concealed by one, some dodge should be used or act done to deprive the deceiver of his property, and he should be made to restore the property he had concealed; but not by use of violence.

Here ends the chapter on 'Partition of Effects concealed.'

CHAPTER XIII.

On Partition among Heirs unequal in Caste.

On this subject, Manu says: "The law already declared should be understood as referring to sons of wives of the same class. Learn now the law as regards sons by wives of different castes. Where there are four wives of a Brahmin in the order of castes and where sons are born of them, the following rule of partition is ordained. The chief servant, the impregnating bull, vehicle, ornaments and the house shall be given as the additional share to the son of the wife of the Brahmin caste, as also a larger share for pre-

(1) Cole. Dig., Vol. 485, CCCLXXVII, 1—4.
(2) Brihaspati, Chap. XXV, 96 and 97.

eminence. Of the rest of the heritage, he shall take three shares; the son of the Kshatriya wife, two; the son of the Vaisya wife, a share and a half; and the son of the Sudra wife, one share."(1) *Commentary*—'*Ekayōnishu*' means 'of the same caste.' '*Ekajathanam* means 'begotten by the same man,' *i.e.*, begotten by the same man on wives of different castes. '*Kenasah*' means 'one who carries the ploughshare.' 'Vehicle,' *i.e.*, horse, etc. Therefore the chief servant, etc., should be given to the son of the Brahminee wife. Of his three shares, one must be made large and valuable. The bull, etc., should be given him, if there be.

In regard to partition when no deduction is allowed, the same author says: "Or let all the heritable wealth be divided into ten shares and let the man who knows the law effect a legal partition according to the following rule:—The son of the Brahminee wife shall take four shares; the son of the Kshatriya wife, three shares; the son of the Vaisya wife, two shares; and the son of the Sudra wife, one share."(2) *Commentary*—The singular number in '*viprah*' being not in requisition, the same rule applies even where there are many such sons.

Nārada says: "In the case of sons by wives inferior in caste, their shares decrease in the order of castes."(3) *Commentary*—'*Varnavarah*' means 'Kshatriya and other wives of a Brahmin.' '*Oodhah*' means 'married.' 'Decrease of shares,' *i.e.*, three shares to the son born of the Kshatriya wife, etc. Some read '*Varnanthareshu*' for '*Varnavareshu.*' The meaning is the same even according to that reading.

In the Mahabharata, Bhishma says: "To a Kshatriya, O son of Kuru, two wives are permitted; or a Sudra woman may be taken as a third wife; but she is not permitted by the Vedas. The wealth of a Kshatriya, O Yudhishthira, should be divided into eight shares; and the son by the Kshatriya wife shall receive four shares of the paternal wealth; he shall also take all the implements of war which belonged to his father. But the son of the Vaisya wife shall have three shares, and the son of the Sudra wife, one share, *i.e.*, the eighth. The Sudra son shall take the share if given him by his

(1) Manu, Chap. IX, 148—151. (2) Manu, Chap. IX, 152 and 153.
(3) Narada, Chap. XIII, 13.

father; but shall not take it if not so given. To the Vaisyâ, one wife only is permitted; or he may take a second wife of the Sudra caste; but she is not permitted by the Holy Writ. The wealth of a Vaisya, however, shall be divided, O lord of Bharata, into five shares. I will now lay down, O lord of men, the mode of division among such sons. Four shares of the paternal wealth shall be taken by the son of a Vaisya wife. But the fifth share shall belong, O Bharata, to the son by the Sudra wife. He shall take that share if given by the father; but shall not take it if not so given."(1) *Commentary*—The word '*Drishtāntah*' means 'the Vedas.' The drift is that, although not spoken of in the Vedas, if a Kshatriya marries a Sudra woman as his third wife from desire, then her son takes a share. Similarly with regard to the subsequent portion of the passage, 'Implements of war,' *i.e.*, swords, etc.

Yājnavalkya says: "The sons of a Brahmin shall take four, three, two and one shares respectively in the order of the castes of their mothers. The sons of a Kshatriya, three, two and one shares respectively. The sons of a Vaisya, two and one shares respectively."(2) *Commentary*—This rule applies where a Brahmin marries four, and a Kshatriya, three, wives. 'The sons of a Brahmin' means 'the sons begotten by a Brahmin upon wives of different castes.' Where the Kshatriya and the Vaisya excel in good qualities, the rule of division pointed out in the Mahabharata applies; but where they are alike in quality, the rule of Yājnavalkya applies. Thus there is no inconsistency.

Vishnu says: "The sons of a Brahmin in the four castes shall divide the paternal wealth into ten shares. Of them, the son of the Brahmin wife shall take four, the son of the Kshatriya wife, three; the son of the Vaisya wife, two; and the son of the Sudra wife, one. If a Brahmin has three sons, but no Sudra son, then they shall divide the wealth into nine parts and take four, three and two shares in the order of their castes. If there be no Vaisya son, they shall divide it into eight shares; and shall take four, three and one share respectively. If there be no Kshatriya son, they shall divide into seven shares and take four, two and one share respectively. If there be no Brahmin son, they shall divide it into six shares and take three, two and one share respectively. This same rule of

(1) Cole. Dig., Vol. II, 308, CXLIII, 1—7. (2) Yājnavalkya, Chap. II, 125.

partition applies in the case of Kshatriyas, Vaisyas and Sudras. Again, if a Brahmin has a Brahmin son and a Kshatriya son, they shall divide it into seven shares; and the Brahmin son shall take four, and the Kshatriya three, shares. If a Brahmin has a Brahmin son and a Vaisya son, they shall divide it into six shares, the Brahmin shall take four, and the Vaisya two, shares. Where the Brahmin has a Brahmin son and a Sudra son, they shall divide it into five shares, of which the Brahmin son shall take four shares, and the Sudra, one. Again, where a Brahmin or a Kshatriya has a Kshatriya son and a Vaisya son, then the property shall be divided into five shares; and the Kshatriya son shall take three shares, and the Vaisya, two. Again, where a Brahmin or a Kshatriya has a Kshatriya son and a Sudra son, the property shall be divided into four shares, of which the Kshatriya son shall take three, and the Sudra, one. Again, where a Brahmin or a Kshatriya or a Vaisya has a Vaisya son and a Sudra son, the property shall be divided into three shares, and the Vaisya shall take two, and the Sudra, one share."(1)

Sankha and Likhita say: "Sons by wives of different castes receive shares in sub-duple proportions in the order of their castes."(2)

Vishnu says: "If a Brahmin has two Brahmin sons and one Sudra son, then the two Brahmin sons shall take eight shares and the Sudra one. Again, if a Brahmin has a Brahmin son and two Sudra sons, then the wealth should be divided into six shares, and the Brahmin son shall take four and the two Sudra sons, two. In this manner should partition be effected even in other cases."(3)

Again, Vishnu says: "An only son takes the wealth of a Brahmin if he be born of a Brahminee, Kshatriya or a Vaisya wife; of a Kshatriya, if born of a Kshatriya or a Vaisya wife; of a Vaisya, if born of a Vaisya wife. The Sudra son takes the wealth of a Sudra."(4) *Commentary*—Where a Brahmin has only one son by wives of the Brahmin and other castes, he takes the whole wealth, if he is a Brahmin, Kshatriya or a Vaisya son. So where a Kshatriya having two wives has only one son, whether Kshatriya or a Vaisya, such son takes the whole wealth. If a Vaisya has only

(1) Vishnu, Chap. XVIII, 1—27.
(2) Cole. Dig., Vol. II, 314, CLV.
(3) Vishnu, Chap. XVIII, 38—40.
(4) Vishnu, Chap. XVIII, 28—31.

a Vaisya son, he takes the whole. If a Sudra has only a Sudra son, he shall take the whole. The third wife of a Kshatriya and the second wife of a Vaisya being not recognized by the Vedas, they are not mentioned here. The same law applies where the third and the second marriages of the Kshatriya and the Vaisya respectively are illegal.

Vasishtha says: "Where a Brahmin has Brahmin, Kshatriya and Vaisya sons, the Brahminee son takes three shares, the Kshatriya sons, two, and the rest divide equally."(1) *Commentary*—'The rest' means 'Vaisya sons.' Here the texts of Vishnu and Vasishtha which lay down conflicting rules of division must be construed as not at variance with each other, regard being had to the relative superiority or inferiority of the co-heirs in respect of qualities.

Manu says: "All the sons of men of the twice-born classes born either of women of equal castes should allow a deduction in favour of the eldest and the rest shall divide equally."(2) *Commentary*—Where there are many sons begotten by men of the twice-born classes on wives of equal or different castes, then they should give the eldest an additional share and divide equally.

Again, Manu says: "But to a Sudra, a wife only of the same caste and none other is ordained. Although a hundred sons be born of her, they shall share equally."(3)

Baudhayana says: "If a man has sons by a woman of equal caste and a son by a woman of inferior caste, and the latter is virtuous, he shall take the share due to the eldest. The virtuous son becomes the supporter of the rest."(4)

Brihaspati says: "If the son of a Brahmin by a Kshatriya wife be the eldest by birth and excel in good qualities, he shall take an equal share with the son by a Brahminee wife; so also the son by a Vaisya wife."(5)

Gautama says: "The son of a Brahmin by a Kshatriya wife if virtuous takes an equal share with the eldest all except the deduction allowed."(6) *Commentary*—'All except, etc.,' means

(1) Vasishtha, Chap. XVII, 47—50.
(2) Manu, Chap. IX, 156.
(3) Manu, Chap. IX, 157.
(4) Baudhayana, II, 2, 3, 12 and 13.
(5) Brihaspati, Chap. XXV, 29.
(6) Gautama, Chap. XXVIII, 35 and 36.

'cows, etc.' The meaning is the deduction allowed in favour of the eldest son shall not be allowed in his case. Just as the son of a Kshatriya wife takes equal share with the son of the Brahmin wife, so where there is no Brahmin son and there are sons of the Kshatriya wife and the Vaisya wife, the son of the Vaisya wife if virtuous shares equally with the younger son of the Kshatriya wife devoid of good qualities. The meaning is that the son of the Kshatriya wife, like the son of the Brahminee wife in the previous case, does not get the share due to the eldest son. The same mode of division should be followed in the case of the Kshatriya and the Vaisya sons of a Kshatriya. So also with respect to the Vaisya and the Sudra sons of the Vaisya. Thus the rule of Baudhayana about allowing the share due to the eldest son should be observed in the case of the younger brother of the same caste and devoid of good qualities. Where the younger is possessed of good qualities he shares equally. There is thus no conflict of authorities.

Brihaspati says: "Land received as a reward of learning should not be given to a son born of a Kshatriya or inferior wife. Even if the father give it the son by the Brahminee wife may resume it after the father's death."(1)

Vriddha Manu says: "The son of the Brahminee wife alone shall take the land acquired by the aid of sacred literature; but all the sons by wives of the twice-born classes shall take the house as also land descended from ancestors."(2) *Commentary*—'*Brahmadayagatham*' means 'received as a reward for sacred literature and for officiating at sacrifices, etc., '*Dvijathayah*' means 'belonging to the three regenerate classes.' *Parijata* interprets the first expression to mean 'obtained as a reward for sacred literature' alone.

Brihaspati says: "A son begotten upon a Sudra woman by any of the twice-born classes shall take no share in land. The son who is by birth of the same caste with the father shall take the whole. Thus is the law settled. The only *Nishada* son of a Brahmin takes a third share of his wealth. Two shares shall be taken by *sakulyas* or by *sapindas*, or by the person performing the funeral rites. In default of kinsmen, the preceptor or the pupil who performs the

(1) Brihaspati, Chap. XXV, 30. (2) Cole. Dig., Vol. II, 317, CLXII.

obsequies shall take them. Under the most difficult circumstances let those shares go to any person of the same original stock."(1) *Commentary*—'Nishada' means 'son begotten by a Brahmin on a Sudra woman.' Thus a third share goes to the son by a Sudra woman, two shares to the *sapindas*; and in default, to the *sakulyas*; and in default of the *sakulyas* the preceptor or the disciple takes them. 'Under the most difficult circumstances' means 'in the absence of all the *sapindas*, *sakulyas*, etc.' Then let the shares be given to anybody belonging to the same *gotra* with the deceased father of the *Nishāda*. Pārijāta says that this rule applies where the *Nishada* son is possessed of good qualities.

Vishnu says: "A Sudra being the only son of twice-born men, shall take half the wealth; the devolution of the second half is the same as that of the wealth of the sonless deceased."(2) *Commentary*—'Twice-born men,' *i.e.*, Kshatriyas and Vaisyas, Brahmins excepted, because the Sudra son of a Brahmin has been declared by Devala to take a third share. The second half belongs to the Brahmins.

Manu says: "Whether a Brahmin has sons, or whether he has no sons (by wives of the twice-born classes) he shall not, according to law, give more than a tenth share to a Sudra son. A son by a Sudra wife is not heir to his Brahmin, Kshatriya or Vaisya father. Whatever his father give him, that alone is his wealth."(3) *Commentary*—Having sons by twice-born women or not. Here Lakshmidhara says, that when the father is pleased to give anything to the son by the Sudra wife, then he shall give only a tenth share. According to his view, therefore, a son by the Sudra wife is not heir, but takes the share of the wealth given him by the father. By Halāyudha and Pārijāta, the first verse has been explained to apply to the son of a Sudra wife altogether devoid of good qualities and the second to the son of a Sudra concubine devoid of good qualities, both denying his right to share.

Brihaspati says: "A Sudra son, virtuous, attending upon and doing service to his sonless father shall receive maintenance and the *sapindas* shall take the rest."(4) *Commentary*—This rule

(1) Brihaspati, Chap. XXV, 32. The rest not found in Brihaspati. This is quoted as an extract from Devala in Cole. Dig., Vol II, 320, CLXV.

(2) Vishnu, Chap. XVIII, 32—33.

(3) Manu, Chap. IX, 154—155.

(4) Brihaspati, Chap. XXV, 31.

applies to a son by a Sudra woman not married, because the word '*aparigrihitasu*' must be read into this verse also.

On this point, Gautama says: "The son by a Sudra woman also, if doing service to his sonless father, shall have something for his livelihood like the disciple."(1) *Commentary*—The meaning is that the son by a Sudra woman not married shall, in the absence of sons of the three regenerate classes, obtain something for his livelihood, such as agriculture, etc., if he has been serving and propitiating like a disciple.

Sankha and Likhita say, that he shall take what his father gives him. "The son by a Sudra woman takes no share. Whatever his father gives him, that alone is his portion. He should be given a pair of cows, not the best, black metal and black grain, except gingily seeds."(2)

Gautama says: "As in the case of the Sudra son, so in the case of *Pratilomas*."(3) *Commentary*—Sons born of other castes like the son of the Sudra woman shall obtain their livelihood, like the disciple. This is the meaning.

Manu says: "A son begotten by a Sudra on his female slave or the female slave of his male slave may take a share if permitted. This is settled law." (4)*Commentary*—'Female slave' is one answering to the description contained in the verse beginning 'taken under a standard,' etc. 'The female slave of his male slave,' *i.e.*, the female slave of a male slave answering to the description above noted. One begotten by a slave upon a maiden by permission is also so regarded. This is settled law. Kalpataru says, that 'the female slave of the male slave' means 'the female slave of his servant.'

Yājnavalkya says: "The son though begotten by a Sudra upon a female slave may become a sharer by his father's choice; but after his father's death, his brothers shall give him half a share."(5) *Commentary*—'*Kamatah*' means 'by his father's choice.' 'Become a sharer' means 'obtain a share.' If after the father's death his sons by married wives shall exist, then they shall give the son by the female slave half their own share. This is the meaning.

(1) Gautama, Chap. XXVIII, 39. (2) Cole. Dig., Vol. II, 323, CLXX.
(3) Gautama, Chap. XXVIII, 45. (4) Manu, Chap. IX, 179.
(5) Yājnavalkya, Chap. II, 133 and 134.

In default of sons by women duly married the same author says: "If he have no brothers, he shall take all the wealth in default of daughter's sons." (1) *Commentary*—In default of sons by wives duly married, of the wife, of her daughter, and of her son the son of the female slave certainly takes the wealth after his father's death.

Here ends the chapter on 'Partition among sons unequal in caste.'

CHAPTER XIV.

On the rights of a son born after partition.

On this subject Manu says: "A son born after partition shall take the father's wealth alone, or shall share it with such of his brothers who live in re-union with him." (2) *Commentary*—Where the sons divide with the father and a son is afterwards born, he takes all the father's share after the father's death. If the father is alive, he takes only a share of the father's property. The particle '*eva*' (alone) indicates that he takes nothing of the shares of the divided brothers.

Brihaspati says: "Where the sons by the same or different wives divide with the father, the sons born after the partition shall take the share allotted to the father. A son born before partition shall have no claim on the father's wealth, nor a son born after it, on the share of his brother." (3) *Commentary*—'*Purvajah*' means 'born before partition,' hence, divided. This son has no claim on the father's share. '*Vibhakthajah*' means 'son born of the divided father.' He has no claim on the brother's share. This is the meaning.

The same author says: "Whatever a father acquires after division with his sons, goes to the son born after partition. Sons born before partition are declared to have no claim to it. As in property, so in respect of debts, gifts, mortgages and sales, they have mutually no claim upon each other except in the matter of pollution and libations of water." (4)

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(1) Yājnavalkaya, Chap. II, 134. (2) Manu, Chap. IX, 216.

(3) Brihaspati, Chap. XXV, 17 and 18. (4) Brihaspati, Chap. XXV, 19 and 20.

Yājnavalkya says: "A son born after partition of a wife of the same caste takes a share; or his share may be of property after calculating receipts and disbursements."(1)

Vishnu says: "Sons divided with the father shall give a share to a son subsequently born."(2) *Commentary*—These two texts apply to cases of sons in the womb at the time of partition and born after it. By this it is declared that to the son in the womb at the time of partition and born after it, the divided sons should give his share, making it up from their own shares. To the son not so conceived but born after partition, the share of the divided father alone, according to the view of Manu and others, belongs, in view to the fact that his existence in the womb at the date of partition may not be visible; if the pregnancy was undoubted, there can be no partition at all. So says Prakāsakāra. Halāyudha, however, quotes Yājnavalkya's text after quoting Vishnu's and explains it as follows: "If the son born, after the partition, of a wife equal in caste is possessed of good qualities, then he takes a share of all the wealth previously divided—tangible or otherwise. If not excellent in good qualities, he takes his share only of tangible properties, such as land, etc., and the produce thereof after deducting the debts contracted by the brothers."

Here ends the chapter on 'the rights of a son born after the partition.'

CHAPTER XV.

On the rights of an heir absent at, and returning after, partition.

On this subject, Brihaspati says: "Where an heir appears before or after partition, and believes he has a claim on the wealth, he takes a share in it."(3) *Commentary*—"*Bhāvayati*" means "thinks (I have a share in this)."

The same author says: "Of debts, wealth secured by documents, house and land descended from the grandfather, he shall take his share of them, though he has been long absent in a foreign

(1) Yājnavalkya, Chap. II, 122. (2) Vishnu, Chap. XVII, 3.

(3) Brihaspati, Chap. XXV, 22.

country. If a man leaves his family and lives in another country, his share should undoubtedly be given to his male descendants when they appear. Whether he be the third or the fifth or even the seventh, he shall, on clear proof of his birth and name, receive the share that gradually descends to him."(1). *Commentary*—The text of Devala that 'male descendants within the fourth degree shall take, etc.,' applies to cases where they are living together and other similar cases. But this rule applies to cases where they are living in countries difficult of access. There is thus no conflict.

The same author again says: "To the descendants of the man who is well-known by tradition among neighbours to have been the proprietor, his kinsmen shall deliver the land."(2)

Here ends the chapter on 'the rights of an heir absent at, and returning after, partition.'

S. SITARAMA SASTRI.

(1) Brihaspati, Chap. XXV, 23 and 25. (2) Brihaspati, Chap. XXV, 26.

NOTES OF INDIAN CASES.

Raghavendra Rau v. Jayaram Rau, I. L. R., 20 M., 283. Many texts of the Hindu Law in the matter of who is eligible as a bride are not only merely hortatory, but even fanciful. *Subrahmania Aiyar* and *Benson*, J. J., held that the text of Asvalayana against the marriage of a wife's sister's daughter is not prohibitive, and their Lordships are fully borne out in their view by the evidence let in as to the usage prevailing in Southern India. As a matter of fact even texts prohibitory in their nature have been disregarded in practice and customary law is much laxer than the texts, especially as to forbidden relationships on the maternal side.

Thillai Chetti v. Ramanatha Ayyan, I. L. R., 20 M., 295. When a mortgagee is also part owner of the equity of redemption, it is clear law that the owners of the remainder of the equity of redemption cannot sue to redeem the whole property. They must sue to redeem their shares only, and for that purpose should have the shares ascertained. *Mamu* v. *Kuttu*, I. L. R., 6 M., 61. It is difficult to see why the Reporter suggests in his head-note that all the mortgagors together could in such a case sue for redemption of the whole property. We can find nothing in the judgment to support the suggestion.

Venkatanarasimha Naidu v. Dandamudi Kotayya, I. L. R., 20 M., 299. We hope the judgment of *Subrahmania Aiyar* and *Benson*, J. J., in this case will set at rest the doubts that have long existed with regard to the onus of proof on the question of the nature of the tenancy when a Zemindar sues to eject a tenant. Their Lordships hold that the rule of English Law that a tenancy is presumed to be one from year to year in the absence of evidence to the contrary is not applicable to holdings in zemindaries in this country. The zemindar is generally the assignee of the Government's share in the produce of the land. Such share is really of the nature of a tax, and the Government never put forward any right to dispose of the land except for the purpose of realising its revenue. The tenant's right of proprietorship in the soil subject to such right was always recognized. There is, therefore, no ground for the presumption that the tenancy is a yearly one and for calling upon the tenant to prove that he has a larger right. The landlord suing in ejectment must therefore prove that he has a right to eject by proving the nature of the tenancy and its determination in one of the modes provided by law. The decision will not affect the applicability of the presumption of English Law in cases of ryotwary holdings generally.

SUMMARY OF RECENT CASES.

Divorce—Judicial separation.

Russell v. Russell [1897, Appeal Cases, 395.]

This case which has been for some time engaging the attention of the legal world, has at last been decided in favor of the Countess of Russell. The law on the subject of divorce has been most elaborately dealt with in the several judgments of the members of the house, and, although the prevailing judgment of the house was only that of a small majority, historically speaking, that judgment seems to be the correct one. We may say with Lord Herschell that "any change must only be made by legislation and that our duty on the present occasion is to administer and not to make the law." The Earl and the Countess of Russell were married in the year 1890. Soon after the marriage they disagreed and separated. The Countess presented a petition praying for a judicial separation on the ground that her husband has been guilty of an odious crime with one Mr. R. The jury, however, acquitted the Earl of all the charges made against him and the petition of the Countess was accordingly dismissed. In spite of this verdict of the jury, the Countess went on reiterating the same thing both in public and private

and persisted in asserting that her husband was guilty of the abominable offence without an honest belief in its truth. The Earl thereon brought this action for judicial separation on the ground of cruelty. The majority of the House held that the acts of the Countess did not amount to legal cruelty to entitle the Earl to a judicial separation. *Lord Herschell*, who delivered the leading judgment of the majority of the House, said: "I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted, unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced."

Parol evidence—Written agreement.

Bank of Australia v. Palmer [1897 Appeal Cases, p. 540.]

The decision in this case would be very useful to our courts in the construction to be put upon Ss. 91 and 92 of the Indian Evidence Act. It was decided in this case that when parol evidence relates to the circumstances under which a person's name was appended to a document, it could be adduced to prove those circumstances, the name not being part of the agreement.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Law of Consent (with special reference to Criminal Law including the doctrines of Mistake, Duress and Waiver) by Hukm Chand, M.A.:—Published by *the Bombay Education Society's Press, Byculla.* Price Rs. 15.

The Specific Relief Act with commentaries, by Mahendrachandra Mitra, M.A., B.L.:—Published by *Mukerjee and Co., Calcutta.* Price Rs. 5.

The Albany Law Journal for October & November (*in exchange*).
The Educational Review for October & November (*in exchange*).
The Calcutta Weekly Notes for October & November (*in exchange*).
The Allahabad Weekly Notes for October & November (*in exchange*).
The Green Bag for October & November (*in exchange*).
The Canada Law Journal for October & November (*in exchange*).
The Canadian Law Times for October & November (*in exchange*).

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Lawyers and their Clerks:—The Registrar and the Deputy Registrars in our High Court are possessed of a considerable amount of imagination

and zeal which are not always exercised to the advantage of the profession or the public. Their imagination is exercised in discovering defects in the working of the High Court where none was known to exist before, and their zeal, in framing rules to remedy such defects. One of the recent discoveries made by the Registrar is that inconvenience is caused to the office in the High Court by the practice of lawyers having more clerks than one to transact their business in the High Court. For our part, we fail to see where the inconvenience lay in the old system, which had been working for more than a generation. The Registrar, however, has passed a rule that the Court should not permit any practitioner to transact his business in Court through more than one clerk. The rule is one calculated to cause great inconvenience and annoyance to the profession. In the case of any vakil with any considerable amount of practice, it is not possible to get on with his work with the help of a single clerk. Owing to the inefficiency of the printed papers department, the purchase of the necessary papers involves a scandalous waste of time and requires the services of a special clerk for that purpose. The work to be done in court by a clerk is often pressing, and if he has to wait at the counter of the clerk in charge of the printed papers for hours together, it is not possible to utilize his services for other emergent work, such as the presentation of appeals, etc. The illness or absence of a clerk even for a day must necessitate an application to the Registrar by the practitioner to permit a substitute for the clerk originally nominated. The transaction of business will be greatly impeded by having to wait till the recognition of the substitute by the Registrar, more especially, when the illness or absence of the clerk is sudden or unforeseen, or occurs during the absence of the practitioner himself from the station. Inconvenience is also likely to be felt in deputing for the tranaction of business in court a clerk who from want of opportunity may not possess the necessary amount of familiarity with the machinery of the court and its working.

The new rule is sure to multiply correspondence with the Registrar and cause loss of time both to the Registrar and to the practitioners. We are sorry we cannot congratulate the Registrar upon the wisdom of his rule.

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Depositions on the Original Side of the High Court:—It will startle many of our readers to be told that no formal record is now made of the depositions of witnesses in the Original Side of our High Court, and that it is not possible to procure any authoritative version of the evidence given by a witness. Till a few months ago, the evidence used to

be recorded by the Judge, and certified copies of the Judge's notes of evidence were granted to suitors. But it has been recently discovered that the Judge's notes are his own private property and that copies of them should not be furnished to the parties. The credit of this discovery belongs to our new Judge Mr. Justice Boddam. The result is that practitioners have to rely upon their own notes only, and incur the risk of being contradicted by the appellate judges by reference to the Judge's notes to which they have no access. Rule 355 of the rules of the High Court, which relates to appeals from the Original Side, contemplates the printing of the evidence recorded in the case. But there will be no evidence to be printed hereafter. It is urged that a Judge of the High Court should not be converted into a clerk and compelled to take down depositions at length. But no one desires to do so; and everybody will be satisfied if a competent Bench Clerk is deputed to take down the depositions as they are given. There is no reason why the system which is adopted in all the mofussil courts throughout the Presidency should not be also adopted in the Presidency Town. Considering the importance of the matter, the Government ought not to grudge any additional expenditure that may be necessary for this purpose; more especially, when it is borne in mind that the Government derives nearly eighteen lakhs per annum from its administration of justice. As things now go, a conviction for perjury is practically impossible. The Judge's notes are not legal evidence; and still less are the Counsels' notes admissible. The evidence on a charge of perjury must consist of the testimony of persons who heard the witness make the statements which are the subject of the charge, and it would not be always safe or reliable to act upon such testimony in matters of this kind. A witness might have made a statement at one time, and might have in the course of the deposition explained it subsequently. It is not possible to make sure that persons who have heard the witness give his evidence have carefully attended to, or remembered everything told by the witness. We hope, the Judges of the High Court will see their way to recommending the entertainment of a competent clerk to take down the depositions of witnesses as they are given.

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Law Reporting in India:—We have often animadverted upon the methods of law reporting in this country, and we have again to draw attention to one of the most serious defects in the system, viz., the want of a current index like the one published in England in connection with the English Law Reports. The digest published by Mr. Woodman under the auspices of the Government are published only at long intervals, and

between the publication of the last digest and the appearance of a new one, there is no digest of cases reported during the interval. A practitioner who is in search of an authority has to refer to four times as many volumes as there are years for which there has been no digest. But what is even more annoying is the trouble involved in finding out authorities in the current series for any year. The practitioner might have to turn over 48 parts of the Reports before he could make sure that there was or was not a decision bearing upon the point engaging his attention. It might be said that the field is open to private enterprise. But, we think, it falls more appropriately within the legitimate duties of the publishers of the reports. We think, the Government ought to insist upon its Law Reporters' publishing current indexes every quarter as in England. It would also be of great use to the profession if the statutes of the Government of India be published with the Reports. Any extra expenditure that may be incurred can be easily met by a slight increase in the subscription.

We may add that the defects we have pointed out have also been noticed by Sir Frederick Pollock, in the preface to his Tagore Lectures on Fraud and Mistake and have been severely condemned.

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The Hindu Gains of Learning Bill:—Mr. Bhashyam Aiyangar's Gains of Learning Bill has at last been introduced into the Council. We noticed it at length at the time when leave was obtained for its introduction. Though six years have elapsed since that date, the Bill has undergone no change. It will be therefore unnecessary for us to offer any remarks upon it in addition to what we have made. The responsibility for delay is not however with the author. It only illustrates the difficulty which a private member has in introducing a Bill into an Indian Legislature. The Bill had of course to be submitted to the Government of India and the Secretary of State; and the opinions of Associations and of leading public men had also to be taken. Sanction has been accorded by the authorities concerned for the introduction of the measure. There is a considerable preponderance of opinion in its favour, judging from the views of the bodies and individuals consulted.

We have found it, however, difficult to understand the attitude of several of the non-official members who spoke upon the Bill at the last session of the Legislative Council. It is much to be regretted, these gentlemen have failed adequately to realize the value of the measure. The Bill tries to render certain what is involved in doubt and to make

clear what is believed to be obscure. If it can be regarded as effecting any change in the Hindu Law, such a change is in the direction of promoting peace and good will among the members of the joint Hindu family and furthering individualism. The only objections that have been urged against it are that it will cause the disruption of Hindu families, and that it will retard the higher education of junior members. We cannot think that there is any force in them. We believe family affection has not died out among Hindus so as to require mercenary considerations to support it. Education is imparted in other countries where there is no joint-family system, not with the prospect of the recipient of that education recouping to the family the expenses incurred by the family, but out of affection and the love of honour and fame. We see no reason why it should be different in India. We hope that when the time comes for the motion that the Bill be passed into law, the non-official members will overcome their difficulties and will vote straight for the measure.

The honorable member in charge of the Bill commands the confidence of Government as a perfectly safe and sound man. And if he cannot succeed in getting a measure through the Council which is undoubtedly beneficial to the community, we fear the day may never come when a non-official member will be able to pilot any legislation through the Council. If Mr. Bhashyam Aiyangar be successful in this, his first endeavour to introduce useful legislation, there is good reason to hope that he will follow it up by other measures of public utility.

The importance of private members seeking to rectify the erroneous action of the courts or the mischievous consequences of judicial legislation is now very great. Most lawyers in the country have begun to feel that the High Courts are beginning to command less and less confidence. The *personnelle* of the High Courts is becoming deficient in talent. Whether this is due to a decadence in the Civil Service or to the civilian's course of training in the country, or to the inferiority of the Barrister Judges sent out from England or to the depreciated rupee, there is no gainsaying the fact that the High Courts of India do not inspire the same confidence that they did 25 years ago. There is no European Judge now in the country who can be said to be a good Hindu lawyer. Nor are there very brilliant specimens of legal acumen in respect of other departments of law. Although we are extremely unwilling to add it, we must not fail to voice the feeling that even the Privy Council has lost somewhat of its ancient reputation. Under these circumstances it is inevitable that mistakes should be committed by courts. They can only be rectified by the Legislature. We may also point out that, when

on one occasion the question of dancing girls making an adoption came before the High Court of Madras, the distinguished Judge who had to deal with it declined to set aside the custom in consequence of a supposed growth in the moral sense of the community; he said that there was an active legislature which might put the law on a proper basis. We may ask where is that active legislature, if even a first effort in the direction of reform in the Hindu Law is to meet with opposition of one kind or another. If the reform is good, and in the right direction, we can see no justification for the opposition. The Privy Council by one stroke of the pen revolutionised the Hindu Law in the Southern Presidency, by declaring all zemindaries alienable at the will and pleasure of the individual holder. What have our conservative lawyers and supporters of the orthodox Hindu Law done to correct the action of the Privy Council; and why should any opposition be raised, because Mr. Bhashyam Aiyangar introduces a small Bill dealing with a vexed question of considerable difficulty and settling it in a simple, just and beneficial manner. We can multiply instances of the erroneous and sometimes ignorant action of the courts producing serious consequences. We think it is the duty of right-minded men who have the welfare of this country at heart, to consider the measure dispassionately and carefully, and lend their support to it.

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How far may Judges be criticised :—The decision of the Supreme Court of Wisconsin in the now famous Eau Claire contempt case, not only makes very interesting reading, but constitutes one of the most emphatic vindications of the rights of free speech and free criticism which we have had from the bench in a long time. It may be well to recall the salient facts of this remarkable case. Judge Bailey of Eau Claire, who was a candidate for re-election last spring, objected to certain editorials and communications in a local paper severely animadverting upon his official conduct and methods. The writer and editor having filed affidavits in contempt proceedings (instituted against them by the judge) alleging the truth of their charges of unfairness, partiality and incapacity against Judge Bailey, he angrily refused to proceed wtih the hearing and made an order adjudging his critics guilty of contempt. The offenders were to be committed to jail, but a writ of prohibition from the Supreme Court saved them from that punishment. The Supreme Court, in reviewing the case, points out the fact that the criticisms made upon Judge Bailey had no reference to any action of his in connection with a case then pending. Whether just or unjust, they were general in their nature, and referred to past conduct. The court

says it is well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and that they do not obstruct the administration of justice, however much, they may tend to prejudice the judge against whom they are directed. While it is of the first importance that judges should perform their grave duties unimpeded, it is equally important that the right of citizens and newspapers to criticise what they deem arbitrary, unworthy and corrupt conduct should be jealously preserved. The court says: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech we do not know where to find it." This is a stinging rebuke, but justly deserved, and one needed to remind arrogant and dictatorial jurists that they are no more above proper criticism than are any ordinary individuals. To slightly paraphrase the poet: "No divinity doth hedge about a judge," least of all at a time when he is a candidate for office. The law provides adequate remedies for unjustifiable attacks upon their character, but does not permit the summary fining and imprisonment of critics, even when their criticisms go beyond what may be deemed proper limits, provided such animadversions do not clearly tend to obstruct the administration of justice in a then pending case :—*The Albany Law Journal.*

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A Poll Parrot on the witness stand:—Poll parrots are often known to talk, and are frequently noted for their garrulity, but it isn't every day that one of these feathered favorites takes the witness-stand in a court of law, and has his or her evidence recorded by a stetnographer. Such an incident, however, enlivened Judge Van Wart's civil court in Williamsburg the other day, when, after the filing of heaps of affidavits and the taking of much oral testimony in the attempt to determine the ownership of a parrot, the judge finally decided to let the much-coveted bird speak for itself. "To my mind," sagely remarked his honor, "the parrot is the missing link in this chain of conflicting testimony, and its presence will decide its rightful ownership." One John Kleinholz had possession of the pet, which is described as being endowed with extraordinary intelligence and an unusually large, lurid and picturesque vocabulary. Kleinholz asseverated most

positively that he had bought the bird from a shipwrecked mariner who had sailed the Spanish main. On the other hand Samuel November, the plaintiff in the action, contended that the bird was his, having strayed away from his home and been captured by his neighbour, Kleinholz. When the case was called for the thirteenth time, Judge Van Wart ordered the marshal to bring in the parrot. This was done, the bird being in a gilded cage, and Kleinholz was commanded by the court to "tell her to come out of her cage and take the stand.' The wise bird, instead of complying, removed a beakful of flesh from one of the defendant's fingers and cried, in such good English as to astonish the judge: "Go away! Go away! Polly wants papa!" The plaintiff, November, then tried his luck, with far different results. As the plaintiff in the suit approached the cage, the bird is described as having smoothed her ruffled feathers, cocked her head to one side to peer into his face, and sidled along the perch confidingly in his direction. When he inserted his hand in the cage she held out one foot and then hopped blithely into his palm. The veracious chronicler of what happened in the court on this interesting occasion continues: "'Kiss papa!' said November, in a voice choked with emotion. He lifted the bird to his face, and she pecked gently at his lips, croaking gravely, 'Polly's papa!' And when November repeated to her the judge's injunction that she should tell the truth, the whole truth and nothing but the truth, she murmured, rubbing her crest against the plaintiff's chin, 'Polly's a good Polly.' Only once thereafter did the bird show agitation, and that was when Kleinholz approached her again, at the judge's command, to see if she would talk to him. Polly uttered a screech and took wing to the window whence no one but November could coax her to descend. That settled it. November was adjudged Polly's rightful owner, and Kleinholz left the court with a threat to sue for the bird's board and lodging.":—*The Albany Law Journal.*

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Registrars and the work they do;—There are eleven registrars attached to the Chancery Division, each of whom receives 1,500*l.* a year. In theory, their duty is to be present in Court when a case is heard, to take a careful note, and afterwards, with the assistance of counsel's briefs, to put the judgment in proper form on paper. This, it is naturally assumed, requires a man of skill and experience. What are the facts? In any complicated matter the judge directs minutes of the judgment to be signed by the junior counsel engaged in the case. When the order is a simple one, it follows the form in a well-known precedent book. As for the registrar's presence in Court, if the case

lasts more than one day there is a different registrar. Thus half a dozen registrars may be present in turn during the hearing of a case, but it is only the last one who eventually draws up the judgment.

Orders made by a judge sitting in chambers are also settled by the registrars, though, quite rightly, no registrar is present when the order is made. Minutes of the order are prepared by the junior clerks of the judge and sent to the registrar, without the parties previously seeing them. Even if the registrar and the parties all agree that the minutes are incorrect, the registrar cannot alter them without their being first returned to the chambers of the judge. Thus, even if the registrars were, as a body, as efficient as officials might reasonably be expected to be whose capabilities are valued at 1,500*l.* a year, their talents would be wasted.

The position is simple. The registrars are but little assistance to the judge, and the system is the cause of constant delay to the suitor. Shorthand-writers, one to each judge, would far more readily save the judges' time and trouble, at an expenditure amounting to about a quarter of the total of the salaries of the registrars, without taking into account those of the numerous clerks, about twenty in all, attached to the registrars' department. If the registrars were abolished, judgments and orders would be drawn up with far less delay, and no less accuracy, than now, and there would remain, after creating a liberal pension fund, enough to provide the salary of an additional judge, as well as the salaries of the shorthand-writers, with a large saving of expense in the immediate future, and the disappearance of an unnecessary and inefficient department.—*The English Law Journal.*

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We take the liberty of extracting the following interesting article on "Obiter Dicta" from the *Albany Law Journal.*

OBITER DICTA.

"OBITER DICTA," said John A. Finch at the recent banquet of the Indiana State Bar Association, "is not statutory Latin, and we have no information as to how the words would have been translated by the commissioners who prepared our first Code, had they been required to make such an attempt. The law dictionaries and the courts translate these words as a phrase, and give us rather an exegesis than a translation. 'Dicta,' says a judge of the New York Court of Appeals, 'are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the

point: they are not the professed, deliberate determinations of the judge himself. Obiter dicta,' he says, 'are such opinions, uttered by the way, not upon the point or question pending, as if drawn aside for the time from the main topic of the case to collateral subjects.'

"An old judge is quoted as saying: 'An obiter dictum, in the language of the law, is a gratuitous opinion, an individual impertinence.'

"I am not much of a dictionary-maker, but I believe I could improve upon either and say: "An obiter dictum is the passing opinion of a judge expressed when it is not called for.'

"A great judge was asked: 'What is the difference between law and equity?' 'Very little in the end,' responded his lordship; 'at common law you are done for at once; in equity you are not so easily disposed of. The former is a bullet which is instantaneously and charmingly effective; the latter the angler's hook, which plays with the victim before it kills him. Common law is prussic acid; equity is laudanum.'

"Whether a man goes down with a law bullet in a vital part or is wearied out as is the fish before being landed, where he may gasp his life out; whether he dies with one convulsion after a swallow of prussic acid or dreamily passes away in the solace of an opium overdraught, is perhaps no matter in the end. In the processes there is a vast difference, but the tombstones—the reports of that court which has the last say—read very much alike. The figure is perhaps not a bad one.

"There is a deal of difference in what should be on the monument and what is on it, and there is equal difference in what should be in the opinions of the courts of last resort and what the judges speaking for the court find time to inject. The elegies and eulogies on the plain memorial slab and the massive monument are often obiter—not meant seriously—and superfluous. The judges of the law courts in bank and the chancellors in their meditative chambers are as much given to superfluous utterances as are the *postmortem* inscriptions in marble. Obiter dicta is a vice common to both.

"A child wandering in a cemetery, after reading the effusive inscriptions, all too superfluous after the statement that a dead man is below, asks where the bad people are buried. A reader of reports, searching for authority, sighs that so much is said when so much less would amply suffice.

"We are taught that we may disregard all obiter dicta, but as we are never sure what the law in a given case is untill some court has

given an opinion in the reports, equally are we never sure what is unnecessary law, the obiter dicta of an opinion, until some later court so informs us. That which we have for years quoted as authority is, in later expression, stripped of its conclusiveness and made simply an impertinence. Not only does the superfluous expression which has been cited or acted upon as decisive become indecisive; it becomes a reproach to the judge who wrote it.

" This sort of thing reminds one of what Artemus Ward said in his lecture on the Mormons;

One of the principal features of my entertainment is that it contains so many things that don't have anything to do with it.' We have been succeeding or failing because of something in an opinion which turns out to have no right to a place in the judicial utterance. A man who has carefully wound up his clock every night for twenty years and then learns that it is an eightday clock has less reason for feeling bad than a lawyer who has lost a case or been guided in advice given by something that turns out to be obiter.

" After having bowed to the supposed law, as found in an opinion of a high court for years, we are suddenly told that the judge who wrote the opinion was ' off his base,' so to speak, and what he said was not the law at all, or, at least, he had no business to have then said it was the law.

" Take the case of the *Home Insurance Company* v. *Morse*, in which the Supreme Court of the United States held that a statute of Wisconsin requiring an insurance company of another State to agree that it would not remove a case against it to the United States Circuit Court was ' illegal and void,' and therefore, not binding on the company. Then read, and rub your eyes as you read, the same court in *Doyle* v. *The Continental Insurance Company*, in which it was held that the State may prescribe any condition that it may deem proper, whether constitutional or not, upon which corporations of other States may enter its borders, using language which was long held as a sword over companies that contemplated taking a case to the United States Circuit Court in that State, or in other States having a like statute. Years afterward we have from the same court (*Barron* v. *Burnside*), in which it was held that the ominous part of *Doyle* v. *The Continental Insurance Company* was obiter dictum; holding further that no conditions can be imposed by a State upon corporations foreign to it which are repugnant to the constitution and laws of the United States. Such an episode reminds

one of the trick on Falstaff that was 'argument for a week, laughter for a month and a jest forever.'

"Borne says: 'Nothing is permanent but change.' And so we have to say of the law. We can never rest secure upon any opinion until we have searched later reports for an opinion modifying or reversing it or declaring some of its vital parts obiter dicta.

"Polonius asked Hamlet, what he was reading. 'Words, words, words,' said Hamlet, and called the writer a 'satirical rogue.' Ben Butler was seen in a railroad train reading what appeared to be a law book, and was asked: 'Are you reading law, general?' 'No,' said he; 'only a volume of Massachusetts reports.'

"There are 166 volumes of Massachusetts reports, 165 volumes of United States Supreme Court reports, and hundreds and thousands of reports of other States. Every year adds to the reports of the courts of this country abont 250 volumes and about 60 volumes of text-books. 'Words, words, words.' Ben Butler to the contrary notwithstanding, all of these words are law unless they have been pronounced obiter dicta.

"Does anybody believe we can allow our presses to go on for-ever belching out books that are of such value that every lawyer must know what is or what is not in the motley throng before he can feel safe? Nay, verily. There must, in some way, from somewhere, come relief.

"The supposed great library at Alexandria was destroyed by the men of Mohammed for the, to them, satisfactory reason that if the books in it agreed with the koran they were unnecessary, and if they did not agree with it they were unsound. Will ever some devoted advocate or some legions of such devotees of the real law—the red-eyed kind, if you please—arise and settle this question by a conflagration?

"Oliver Wendell Holmes said he doubted not that if all the medicines in the world were dumped into the sea it would be a great deal better for the human family, though a great deal worse for the fishes. Some such remark could be made about our voluminous libraries. If something violent should happen to all the law reports now crowding our shelves, and all, or nearly all, of the books of alleged authors on particular branches of the law—such books being in the main a product of scissors, paste pot and a $10-a-week drudge—would anybody suffer?

"A long time ago an old man wished that his adversary would write a book. It needs no argument to prove that no lawyer ever said that;

our enemies have written books, lots of them; too many of them, such as they are: and the spoiling of paper goes merrily on. 'Much study is a weariness of the flesh,' it is true, but winnowing chaff for an occasional grain of wheat is more weariness still. Are we for-ever to roll at the ever increasing stone of Sisyphus, or shall we make some effort to relieve ourselves and our successors?

"I am myself a lecturer on a branch of the law in a reputable law college. At the beginning of my course, or at the end, or, mayhap, many times *ad interim*, I tell my classes there is no logical, coherent, justifiable law on the subject; that there are decisions galore, and that those decisions will control in the trial courts, not because they are right, but because they are decisions bound in calf, or sheep, or hide of some other animal. I advise them to scorch well these volumes in animal skins, and say that the lawyer who finds most opinions leaning his way will succeed the best. It is not a question of logic or elementary law of the sort that is the 'perfection of reason.' It is simply a question of numerical strength. 'The Lord is on the side of the heaviest battalions,' said Napoleon.

"Indiana has more courts and more judges and annually issues more reports than all England. Our reports seem to get more voluminous and contain less law. The first volume of Blackford has 432 pages and contains 504 cases. The last volume of Indiana reports has 700 pages and 179 cases. Comparison of the first and last volume of reports of any other State will show like numerical results. Does this signify? Yes, verily, it does signify. It signifies all too much. Do lawyers at the bar or judges on the bench carefully reason or copiously remember? Is the law a matter of reasoning or is it a matter of searching for cases in point?

"Obiter dicta might be applied to many a volume in its entirety, to many a page of opinion for its mere prolixity.

"Men and brethren, what shall we do to be saved?"

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